TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 30

CITY BANK FARMERS TRUST COMPANY, EXECUTOR UNDER THE WILL OF THOMAS B. CLARKE, DECEASED, APPELLANT,

vs.

WILLIAM A. SCHNADER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, AND LEON D. METZGER, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 4, 1934

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER TERM, 1932

No. 7395

CITY BANK FARMERS TRUST COMPANY, Executor Under the Will of Thomas B. Clarke, Deceased,

vs.

Honorable WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

L. M. Swope, Drinker, Biddle & Reath, H. S. Drinker, Jr., H. Gordon McCouch.
W. A. Schnader.

DOCKET ENTRIES

Nov.	23, 1932.	Bill of Complaint filed.
"	23, "	Subpœna and Duplicate-Original Subpœna exit—returnable December 13, 1932.
"	23, "	Appearance of L. M. Swope, Esq., H. S. Drinker Jr. Esq., and H. Gordon McCouch, Esq., for plaintiff filed.
"	23, "	Motion for interlocutory injunction filed.
"	23, "	Injunction affidavit by C. C. Jordon filed.
"	23, "	Injunction affidavit by F. Kimball filed.
"	25, "	Restraining order filed.
"	25, "	Bond sur restraining order in $1,000 with American Surety Company of New York surety, and Decree approving same filed.
"	25, "	Printed copy of bill of complaint filed.
"	30, "	Proof of service of notice required by Sec. 266 of the Judicial Code filed.
Dec.	2, 1932.	Duplicate original su-pœna returned; "on November 29, served" and filed.
"	6, "	Subpœna returned: "on November 23, served Wm. A. Schnader; not requested to serve L. D. Metzger", and filed.

[fol. 2]

Dec. 19, 1932. Answer filed.
" 19, " Argued sur motion for interlocutory injunction.
Jan. 5, 1933. Printed copy of stipulation filed.
Mar. 24, 1933. Opinion (Thompson, C. J., Dickinson and Kirkpatrick, D. JJ.) that Bill of Complaint be dismissed for want of equity filed.
Apr. 11, 1933. Final Decree dismissing Bill of Complaint filed.
" 11, " Assignments of Error and prayer for reversal filed.
" 11, " Petition for appeal and Decree allowing appeal filed.
" 11, " Statement as to jurisdiction of appeal filed.
" 11, " Bond for costs sur appeal in $250 with American Surety Company of New York surety, and Decree approving same filed.
" 11, " Citation to Supreme Court of United States exit.
" 28, " Citation returned: "service accepted" and filed.
May 4, 1933. Proof of service of copy of appeal papers filed.
" 8, " Præcipe for transcript of record sur appeal filed.
" 8, " Proof of service of præcipe for transcript of record sur appeal filed.
May 17, 1933. Transcript of record transmitted to counsel for plaintiff-appellant.
Jan. 16, 1934. Mandate from Supreme Court of United States reversing decree of this Court and remanding cause to this Court with instructions to reinstate Bill of Complaint and proceed to a hearing upon the merits, filed.
Feb. 5, 1934. Argued sur Pleadings and Proofs.
Mar. 29, 1934. Opinion, Kirkpatrick J., of Special Court (Thompson, C. J., Dickinson and Kirkpatrick, D. JJ.) granting leave to dis-

miss Bill of Complaint, together with findings of fact and conclusions of law, and dissenting opinion, filed.

Apr. 5, 1934. Decree dismissing Bill of Complaint filed.
" 5, " Petition for appeal to U. S. Supreme Court and Decree granting appeal filed.
" 5, " Assignments of Error and Prayer for Reversal filed.
" 5, " Statement as to jurisdiction of appeal filed.
" 5, " Citation to Supreme Court of the United States allowed and issued.

[fol. 3]

Apr. 10, 1934. Bond sur appeal in $250, with American Surety Company of New York surety, and Decree approving bond filed.
" 16, " Citation returned: "service accepted" and filed.
" 16, " Notice as to opposing statement of jurisdiction filed.
" 16, " Proof of service of papers pursuant to Rule 12 filed.
" 18, " Stipulation of counsel as to transcript of record sur appeal filed.
" 25, " Waiver of jurisdiction filed.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed Nov. 23, 1932

To the Honorable the Judges of the said Court:

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, brings this bill of complaint against the Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania; and thereupon complains and says:

1. Plaintiff was at all times hereinafter mentioned and still is a banking corporation with trust powers, duly or-

ganized and existing under the law of the State of New York.

2. Defendant, William A. Schnader, is the duly appointed and qualified Attorney General of the State of Pennsylvania; and is a citizen of the United States, and a resident of the City of Philadelphia, County of Philadelphia, State of Pennsylvania and Eastern District of said State.

3. Defendant, Leon D. Metzger, is the duly appointed and qualified Secretary of Revenue of the Commonwealth of Pennsylvania and as such is the administrative head of the Department of Revenue of said Commonwealth; and is a citizen of the United States, and a resident of Harrisburg, Dauphin County, State of Pennsylvania, and Middle District of said State.

4. The matter in controversy in this case, exclusive of interest, exceeds the sum or value of Three Thousand Dollars ($3,000).

5. Thomas B. Clarke, a citizen of the United States and a resident of, and legally domiciled in, the Borough of Manhattan, City, County and State of New York, died on the 18th day of January, 1931, leaving a will and codicils thereto which were duly admitted to probate as the last Will and Testament of said Thomas B. Clarke by the Surrogate's Court of New York County to which court jurisdiction in that behalf appertained, on the 27th day of January, 1931, and letters testamentary thereunder duly issued to the said City Bank Farmers Trust Company, and said letters still remain in full force and effect. Copy of said will and codicils are hereto annexed and made a part hereof, marked "Exhibit A".

6. At the time of said Thomas B. Clarke's death, there was on exhibition in the Pennsylvania Museum and School of Industrial Art at Philadelphia, a collection of seventy-nine (79) early American portraits which he had assembled over a period of twenty or thirty years and had loaned to the Museum on the occasion of the formal opening of the new Museum Building on the Parkway, in March, 1928. Said Thomas B. Clarke had no other property located in [fol. 5] Pennsylvania or taxable therein at the time of his death.

7. Said collection of paintings had an estimated market value on the date of death of $714,750.00.

8. The plaintiff is informed, believes and therefore avers that said collection of early American portraits had been loaned to the Museum for the purpose of free exhibition to the public, at the request of Dr. Fiske Kimball, Director of the Museum, who was an intimate friend of the deceased, Thomas B. Clarke; that no consideration was paid or intended to be paid to said Thomas B. Clarke for such loan, that there was no written agreement respecting the loan, which was entirely an oral transaction; but that it was understood by and between Thomas B. Clarke and said Dr. Fiske Kimball that the pictures should be returned to the owner at any time upon his request.

9. The plaintiff is informed, believes and therefore avers that on several occasions subsequent to the date of the original loan, said Thomas B. Clarke suggested the return of said paintings but under pressure from Dr. Fiske Kimball to extend his loan because of the great appreciation shown by the public thereof, said Clarke orally consented from time to time, to leave the paintings temporarily at the Museum, and thus, said portraits were there on display at the time of Thomas B. Clarke's death.

10. The plaintiff is informed, believes and therefore avers that said, The Pennsylvania Museum and School of Industrial Art, is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania, and has secured a substantial portion of works of art therein displayed to the public by voluntary loans from non-resident philanthropists; and such accommodation loans of works of art, none of which were intended or regarded as permanent loans to said The Pennsylvania Museum and School of Industrial Art, have been continued for an average period considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke.

11. Under the will of said Thomas B. Clarke, deceased, as amended by the second codicil thereto, the executor was directed to sell all of the decedent's property, including [fol. 6] the said collection of portraits, and after payment of certain legacies and the setting up of certain trusts the

residuary estate was bequeathed to said City Bank Farmers Trust Company, in trust, to collect and pay the income from one-half thereof to the testator's son for life and upon the said son's death, to pay the principal of said one-half part to the son's issue, or in default of issue, to certain charities named; and as to the other half, to divide the same into four equal parts and to collect and pay the income of three of said parts, respectively, to three relatives of the testator, and upon the death of each such life beneficiary to pay the principal of his or her share to his or her issue, and to pay and deliver the principal of the fourth such part to certain nieces of the testator.

12. Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, provides in part as follows:

"Section 1. Be it enacted, &c., That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:

(a) When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situated within this Commonwealth or elsewhere.

(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

Said tax is imposed by said Act at the rate of 2% of value on transfers to lineal descendants and certain other close relatives and at the rate of 10% on transfers to collaterals and all others; except that any buildings, grounds, books, manuscripts, curios, pictures, statuary or other works of [fol. 7] art, specimens of natural history or other scientific collections passing by will to any municipality, corporation, or unincorporated body for the sole use of the public by

way of free exhibition within the State of Pennsylvania, are not subject to any inheritance tax by express provision of the Act of July 9, 1919, P. L. 794, as amended by the Act of June 12, 1931, P. L. 553.

13. Under the provisions of the Act of April 9, 1929, P. L. 343, Art. XIV, Sec. 1401; 72 P. S. § 1401, said inheritance tax is apparently a lien on the property transferred subject to such tax, from the date of settlement until the tax is paid or satisfied, such lien being limited to the property chargeable therewith.

14. The procedure for the collection of transfer inheritance taxes on transfers from estates of non-resident decedents as provided by Section 1201 of said Act of April 9, A. D. 1929, P. L. 343, 72 P. S. § 1202, is that the Department of Revenue whenever the occasion may require, shall appoint an appraiser to appraise the value of such property if subject to tax; such appraiser shall forthwith give notice by mail to interested parties of the time and place when and where he will appraise such property, at which time he shall truly appraise the property for taxation and make report thereof to the Department of Revenue in writing; and the Department of Revenue shall immediately give notice to all interested parties, and "any person not satisfied with the appraisement made by an appraiser appointed by the Department of Revenue may appeal within 30 days to the Court of Common Pleas of Dauphin County on paying or giving security to pay all costs, together with whatever tax shall be fixed by the Court. Upon such appeal, the Court may determine all questions of valuation, and the liability of the appraised estate for such tax subject to the right of appeal to the Supreme or Superior Court."

And it is provided in Section 1406 of the Act that the Department of Justice may bring suit at law or in equity in any court in the Commonwealth to recover such taxes "and a remedy by means of such suit is hereby provided, whether it be now authorized by law or not".

And it is further provided in Section 203 (h) of said Act that the Department of Revenue shall have the power and [fol. 8] its duty shall be to collect the transfer inheritance tax payable on estates of non-resident decedents.

Section 503 of said Act provides the only relief after payment of the tax by allowing a petition for refund to the

Board of Finance and Revenue, an administrative Board within the Department of Revenue; but provides that the action of the Board on such petition shall be final and thereby denies an appeal from its decision to the courts. The Act makes no provision for interest on refunds granted and plaintiff is advised, believes and therefore avers that in practice no interest is allowed thereon.

15. On March 25, 1931, plaintiff, through its attorneys, disclosed the facts involved in this case to Mr. Linn L. Reist, the proper official in the Department of Revenue in charge of the appraisal, assessment and collection of inheritance taxes on non-resident estates, and, by letters dated March 26th and April 27, 1931, to the defendant, William A. Schnader.

16. On April 7, 1931, plaintiff's attorneys in Philadelphia, received the following notice:

"Commonwealth of Pennsylvania, Department of Revenue

Harrisburg, April 6th, 1931.

"This is full and sufficient notice that an official appraisement of the Pennsylvania assets belonging to the Estate of Thomas B. Clarke, late of New York City, will be held in P.M.
the office of the Secretary of Revenue on Monday morning, 2-30
April 20th, 1931, at Eleven o'clock.
Harry T. Shadduck, Appraiser. Harry T. Shadduck."

17. Under date of April 13, 1931, defendant, William A. Schnader, addressed a letter to plaintiff's counsel in Philadelphia, insisting upon making a formal record by filing a return with the Department of Revenue and appearing before the appraiser at the hearing set and described in the preceding paragraph.

18. Pursuant to the said instructions of the defendant, William A. Schnader, plaintiff filed under protest with the [fol. 9] Department of Revenue at Harrisburg, Pennsylvania, on April 20, 1931, a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions". The material parts of said return are as follows:

"5. That the total gross value of the real estate and the goods, wares and merchandise within the Commonwealth of Pennsylvania, and of the shares of stock of corporations of the Commonwealth of Pennsylvania and National Banking Associations located therein, of which the decedent died possessed, amounted to the sum of $—o—, a complete inventory whereof is attached as Schedule D. See, however, items included in Schedule D under protest."

"Schedule D

"79 Portraits by early American artists loaned to Pennsylvania Museum of Art at Philadelphia, listed and described in appraisal affidavit of Clarence J. Dearden hereto annexed $714,750.00.

"Some time prior to his death the decedent loaned the above described paintings to the Pennsylvania Museum of Art at Philadelphia for purposes of public exhibition. These paintings have been and still are exhibited in connection with a number of other portraits by early American artists which are the property of The Art House, Inc., a New York corporation controlled by the decedent. The loan of the decedent's paintings was made at the request of Mr. Fiske Kimball, Director of the Pennsylvania Museum, and the arrangements were informal. No written contract or other agreement was made and no definite time was fixed as the duration of the loan. No consideration was paid to Mr. Clarke for the loan. It was understood that Mr. Clarke could recall the paintings at any time. It happened that the paintings were still physically located in Philadelphia at the time of decedent's death, but it is respectfully submitted that they were only temporarily in the State of Pennsylvania and had no actual situs therein for purpose of taxation.

"The said 79 paintings were the only property of the decedent within the Commonwealth of Pennsylvania at the time of his death."

19. On April 20, 1931, the scheduled hearing was held in Harrisburg by Harry T. Shadduck, an appraiser in the [fol. 10] Department of Revenue, since resigned, at which hearing plaintiff was represented by counsel and denied the right of the Commonwealth of Pennsylvania to appraise, assess and collect a tax upon the aforesaid collection of

paintings temporarily in the Commonwealth of Pennsylvania at the time of decedent's death. Said appraiser referred the question of taxability of the aforesaid paintings to the Department of Justice, of which defendant, William A. Schnader, is head, for a determination. Pending such decision, he made no attempt to appraise the taxable value of the estate but postponed said hearing from day to day to a future undetermined day to be held after the Department of Justice had passed upon the legality of the proposed tax, and after notice to the parties.

20. Throughout the spring of 1932, in response to repeated requests of plaintiff for an immediate determination of tax liability, the defendant, William A. Schnader, orally advised plaintiff through its counsel that the Department of Justice was withholding determination of the legal question of liability pending an attempt on its part to work out a reciprocity agreement with the State of New York concerning the taxation of movable tangible property under circumstances such as those involved in this case.

21. Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1931, from the New York State Tax Commission that the said collection of 79 paintings had its situs in New York and was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania had been refused. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid to the State of New York on July 15, 1932, an estate tax amounting to $69,500 on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500.00.

22. Immediately after such payment to New York, plaintiff again through its counsel took up the question with [fol. 11] defendant, William A. Schnader, who orally advised plaintiff that its claim of non-taxability in Pennsylvania would be denied.

23. The plaintiff is advised by its counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 12, supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily "within this Commonwealth" at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

24. The plaintiff is advised by its counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

25. The plaintiff avers that the threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the unlawful failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate for over a year and a half, has caused and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator.

[fol. 12] 26. The plaintiff is advised by its counsel, believes and therefore avers, that it has no adequate remedy at law in that the statutes of Pennsylvania make no provision for

bringing suit in the courts of that state for the refund of inheritance taxes overpaid but only provide, as aforesaid, for an application for a refund to an administrative board from whose decision there is no appeal and even if favorably decided by such board, no interest is allowed on any refund granted; in that the only remedy provided by the statutes of Pennsylvania prior to payment is a statutory form of appeal to the Dauphin County Court where a bond must be posted covering the full amount of tax and costs of suit and there is no provision for the restitution of the cost of such bond, which, in this case, would amount to a large sum of money, even if plaintiff should succeed before such Court; and in that the plaintiff has no adequate remedy at law in the federal courts, to which it is entitled because of the diversity of citizenship between the parties to this suit.

Wherefore the plaintiff is in need of equitable relief and prays:

A. That an injunction issue temporary until hearing and perpetual thereafter enjoining and restraining the defendant, Leon D. Metzger, and his and each of his deputies, officers, agents, servants and employees and any and every person in the Department of Revenue of the Commonwealth of Pennsylvania, acting under and by virtue of his authority, from in any way completing or attempting to complete the appraisement, assessment and collection of inheritance taxes from the plaintiff in the estate of Thomas B. Clarke now being undertaken and from refusing to issue a tax waiver to the plaintiff covering the property set forth above.

B. That an injunction issue temporary until hearing and perpetual thereafter enjoining and restraining the defendant, William A. Schnader, and his and each of his deputies, officers, agents, servants and employees and any and every person in the Department of Justice of the Commonwealth of Pennsylvania, acting under and by virtue of his authority, from enforcing the provisions of the said section 1 of the Pennsylvania Act of June 20, 1919, P. L. 521, as [fol. 13] amended, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of inheritance taxes upon the transfer by death of

said Thomas B. Clarke, deceased, of the aforesaid collection of 79 paintings.

C. That a temporary restraining order be issued against defendant, Leon D. Metzger, and each of his officers, agents, servants and employees in the Department of Revenue from proceeding with the appraiser's hearing aforesaid and from making a tax appraisement and assessment in this estate.

D. That such other and further relief be granted as to your Honorable Court shall seem meet.

E. That a duplicate writ may issue out of and under the seal of this Honorable Court directed to the United States Marshal of the Middle District of the State of Pennsylvania for service upon the defendant, Leon D. Metzger, said duplicate writ therein and thereby commanding the said defendant on a certain day therein to be named and under a certain penalty to be and appear before this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide by any order, direction and decree which may be made against him in the premises.

And the plaintiff will ever pray, etc.

Leslie M. Swope, Henry S. Drinker, Jr., H. Gordon McCouch, Attorneys for plaintiff. King, Barr & Robbins, 60 Broadway, New York, N. Y., of Counsel.

Duly sworn to by Charles C. Jordan. Jurat omitted in printing.

EXHIBIT "A" TO BILL OF COMPLAINT

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory, do make, publish and declare the following to by my Last Will and Testament, hereby revoking all other and former wills by me at any time made:

[fol. 14] First. I direct that all my just debts and funeral expenses be paid as soon after my decease as possible, and I direct that all transfer and inheritance taxes shall be paid out of my residuary estate.

Second. I direct my Executor to convert into money all of my estate, both real and personal, and to that end to sell at public or private sale my house No. 22 East 35th Street, New York City, and all its contents, also my property known as "Lindenland" on the main road at Hayground, Southampton Township, Long Island, New York, consisting of about fifteen acres of land with the house, garage and other buildings thereon, together with all the contents thereof, also my unimproved property on Lily Pond Lane, Easthampton, Long Island, New York. It is my wish that my Executor shall exercise its judgment as to the time and manner of effecting the sale of my property, and I advise my Executor to consult with my son Thomas Benedict Clarke, Jr., with my friend James W. Ellsworth, Esq., and with Mr. Clarence J. Dearden and Miss Alice T. Bay, President and Treasurer respectively of The Art House, Inc., as to the disposal of my artistic effects. And in order to carry out the provisions of this paragraph of my will, I hereby give and grant unto my Executor full power to sell any or all of my real property.

Third. Out of the proceeds of the sale of the property referred to in Article Second and out of all other funds belonging to my estate available for that purpose I direct that the following payments be made:

1. I give and bequeath to my son Thomas Benedict Clarke, Jr., the sum of Two hundred and fifty thousand dollars ($250,000).

2. I give and bequeath to my daughter-in-law Elsie Ferguson Clarke, the sum of Twenty-five thousand dollars ($25,000).

3. I give and bequeath to each of my brothers and sisters, Mary Ellen Keys, Frances Anna Merrifield, William Addison Clarke and Paul Irving Clarke, who may survive me, the sum of Five thousand dollars ($5,000).

4. I give and bequeath to Clarence J. Dearden, the sum of Five thousand dollars ($5,000), to Alice T. Bay, the sum [fol. 15] of Three thousand dollars ($3,000), and to Charles X. Harris the sum of Two thousand ($2,000); the said persons being at present the President, Treasurer and Secretary respectively of The Art House, Inc., a corporation hav-

ing its principal place of business at 12 East 41st Street, in the Borough of Manhattan, City of New York.

5. I give and bequeath to Alfred Thomas and Rose Thomas, his wife, who have been faithful servants in my household for many years, each the sum of One thousand dollars ($1,000) if still in my employment at the time of my death.

6. I give and bequeath the sum of Two hundred thousand dollars ($200,000) to The Farmers' Loan and Trust Company, in trust, nevertheless, for the following uses and purposes, that is to say: to divide the same into four equal and separate shares which shall be held, managed and disposed of as follows, respectively, to wit:

(a) One of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my sister Mary Ellen Keys during her life. Upon her death, or in case she should die before me, upon my death, to pay the principal of said separate share to her issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sister Frances Anna Merrifield in equal shares per stirpes.

(b) The second of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my sister Frances Anna Merrifield during her life. Upon her death, or in case she should die before me, upon my death, to pay the principal of said separate share to her issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sister Mary Ellen Keys in equal shares per stirpes.

(c) The third of said separate shares I direct my said trustee to hold, manage, invest and reinvest and to collect [fol. 16] the rents, income and profits therefrom and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my brother William Addison Clarke during his life. Upon his death, or

in case he should die before me, upon my death, to pay the principal of said separate share to his issue then surviving in equal shares per stirpes, or in default of such issue then surviving, to the issue of my sisters Mary Ellen Keys and Frances Anna Merrifield in equal shares per stirpes.

(d) The fourth of said separate shares I direct my said trustee to invest and reinvest and to collect the rents, income and profits therefrom; and after deducting its commissions and all lawful and necessary expenses therefrom to pay over the net income to my brother Paul Irving Clarke during his life. Upon his death, or in case he should die before me, upon my death, to pay over said income to his wife Eleanor during her life as long as she remains unmarried. Upon her death or remarriage, after the death of my said brother, I direct my said trustee to pay the principal of said separate share to the issue then surviving of my said brother by his wife Eleanor in equal shares per stirpes. In case there shall be no such issue surviving at the time when the principal of said separate share becomes payable, I direct my said trustee to pay the said principal to the issue then surviving of my sisters, May Ellen Keys and Frances Anna Merrifield in equal shares per stirpes.

Fourth. All the rest, residue and remainder of my estate I direct my Executor to divide into two equal parts, and to pay and deliver one of such equal parts to The Farmers' Loan and Trust Company, in trust, nevertheless, for the following uses and purposes, that is to say, to hold, manage, invest and reinvest and to collect the rents, income and profits therefrom, and after deducting its commissions and all lawful and necessary expenses to pay over the net income to my son Thomas Benedict Clarke, Jr., during his life. Upon his death, or in case he should die before me, upon my death, to pay the principal of said equal part of my residuary estate, to his issue then surviving in equal shares per stirpes, or in default of such issue then surviving to pay the said principal in equal shares to the Na- [fol. 17] tional Academy of Design of New York and the Fifth Avenue Hospital of New York City.

I direct my Executor to pay and deliver the other of such equal parts of my residuary estate to The Farmers' Loan and Trust Company, to be added to the sum which I have hereinbefore given to it by subdivision (6) of Article Third

of this my will and to be held by it upon the trusts therein established.

Fifth. I hereby nominate, constitute and appoint The Farmers' Loan and Trust Company, whose principal place of business is at 22 William Street, Borough of Manhattan, New York City, Executor of this my Last Will and Testament, and Trustee of all the trusts herein created.

In witness whereof I have hereunto subscribed my name and affixed my seal at the City of New York this twelfth day of May, One thousand nine hundred and twenty-two.

Thomas Benedict Clarke. (L. S.)

The foregoing instrument was at the date thereof signed, sealed, published and declared by the said Thomas Benedict Clarke, the testator therein named, as and for his Last Will and Testament in our presence and in the presence of each of us, the undersigned, and we thereupon at the same time, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names and residences as subscribing witnesses at 7 East 40th Street New York City.

Wolcott P. Robbins, 141 East 71st Street, New York City. William D. Bickham, Palmer Ave. Philipse Manor, N. Y.

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory, do hereby make, publish and declare the following as and for a Codicil to my Last Will and Testament, which bears date the 12th day of May, One Thousand nine hundred and twenty-two, that is to say:

First. I hereby revoke subdivision 2 of Article Third of said Will.

Second. I hereby re-publish, ratify and confirm my said Last Will and Testament in all respects, except as altered and modified by said Codicil.

[fol. 18] In witness whereof I have hereunto set my hand and seal this 13th day of June, One thousand nine hundred and twenty-three, in the City, County and State of New York.

Thomas Benedict Clarke. (L. S.)

The foregoing instrument was on the day of the date thereof in our presence signed, sealed, published and declared by the above named Thomas Benedict Clarke to be a Codicil to his Last Will and Testament dated May 12, 1922, and we thereupon at his request, in his presence and in the presence of each other hereunto signed our names as subscribing witnesses.

William G. Owens, 85 Audubon Ave., N. Y. City.
Wolcott P. Robbins, 911 Park Avenue, New York City.

I, Thomas Benedict Clarke, of the City, County and State of New York, being of sound mind and memory do hereby make, publish and declare the following as and for a Second Codicil to my Last Will and Testament, which bears date the twelfth day of May, One thousand nine hundred and twenty-two.

First. The property described in Article Second of my said Will as "my unimproved property on Lily Pond Lane, East Hampton, Long Island, New York" has been sold by me since the date of my said Will.

I wish to amend the advice which by Article Second of my said Will I have given to my Executors as to the persons with whom they shall consult in regard to the disposal of my artistic effects by omitting the name of James W. Ellsworth, Esq., who has died since the date of said Will.

Second. I hereby revoke subdivision 3 of Article Third of my said Will and in lieu of said subdivision 3, and with the same effect as though part of said Article Third of said original Will I provide as follows:

3. I give and bequeath to my sister, Mary Ellen Keys, and to my brother, William Addison Clarke, each the sum of Five thousand dollars ($5,000).

[fol. 19] I give and bequeath the sum of Two thousand five hundred dollars ($2,500) each to my nieces, Ruth and Pauline Merrifield, daughters of my sister, Frances Anna Merrifield.

Third. I amend subdivision 4 of Article Third of my said Will by increasing the legacy therein given to Clarence J. Dearden from Five thousand dollars ($5,000) to

Six thousand dollars ($6,000) and by increasing the legacy therein given to Alice T. Bay from Three thousand dollars ($3,000) to Five thousand dollars ($5,000). In addition to said legacy, I give and bequeath to said Alice T. Bay an annuity of One thousand dollars ($1,000) per annum, payable in equal quarterly instalments, the first payment to be made one year after my death.

Fourth. I amend subdivision 5 of Article Third of my said Will by increasing the legacy therein given to Alfred Thomas from One thousand dollars ($1,000) to One thousand five hundred dollars ($1,500).

Fifth. I give and bequeath to William J. Kain, now employed by The Art House, Inc., the sum of Two thousand dollars ($2,000).

Sixth. I give and bequeath to my cousin, Jessie Mather, of Slingerlands, Albany County, New York, the sum of Two thousand five hundred dollars ($2,500), and in addition thereto an annuity of Six hundred dollars ($600) per annum, payable in equal monthly instalments commencing one month after my death.

Seventh. My sister, Frances Anna Merrifield, having died since the date of my said Will, I direct that the fund which by subdivision 6-(b) of Article Third of my said Will is directed to be held in trust for her together with such part of my residuary estate as may be added to said fund pursuant to Article Fourth of my said Will, shall not be held in trust but shall upon my death be paid in equal shares to my nieces, Ruth and Pauline Merrifield, daughters of my said sister Frances, or if only one of them shall survive me, then to the survivor of them.

Eighth. My brother, Paul Irving Clarke, having died since the date of my said Will, I amend subdivision 6-(d) of Article Third of my said Will so that the fund which [fol. 20] was thereby directed to be held in trust for him, together with such part of my residuary estate as may be added thereto pursuant to Article Fourth of my said Will, shall be held by my Trustee in trust and the income therefrom paid to Eleanor Clarke, widow of my said brother Paul, during her life as long as she remains unmarried. Upon her death or remarriage, I direct my said Trustee to pay the principal of said separate share to Mildred Kien-

busch, daughter of my said brother Paul, now the wife of Carl Otto Kienbusch, of 12 East 74th Street, New York City. In case my said niece is not living at the time when the principal of said separate share becomes payable, I direct my said Trustee to pay the said principal to the issue then surviving of my two sisters Mary Ellen Keyes and Frances Anna Merrifield, in equal shares per stirpes.

Ninth. The Farmers Loan and Trust Company named in my said Will as Executor and Trustee, being now known as City Bank Farmers Trust Company, I hereby ratify and confirm the appointment of said City Bank Farmers Trust Company as Executor of my Last Will and Testament and Trustee of all the trusts created therein and by this Codicil.

Tenth. I hereby re-publish, ratify and confirm my said Last Will and Testament dated May 12, 1922, in all respects, except as altered or modified by the First Codicil thereto bearing date June 13, 1923, and by this Second Codicil thereto.

In witness whereof I have hereunto set my hand and seal this Ninth day of January, 1931, in the City, County and State of New York.

Thomas B. Clarke. (L. S.)

The foregoing instrument was on the day of the date thereof in our presence signed, sealed, published and declared by the above named Thomas Benedict Clarke to be a Second Codicil to his Last Will and Testament dated May 12, 1922, and we thereupon at his request, in his presence and in the presence of each other hereunto signed our names as subscribing witnesses.

Wolcott P. Robbins, 215 East 72nd Street, New York City. John D. Graves, 9024 212 Place, Queens Village, New York. Robert B. Meigs, 341 W. Dudley Ave., Westfield, N. J.

[fol. 21] [Endorsed:] Exhibit A. Last will and testament of Thomas Benedict Clarke. Dated May 12th, 1922. Codicil. Dated June 13th, 1923. Second codicil. Dated January 9th, 1931. Admitted to Probate by the New York County Surrogates Court January 27, 1931. Letters testamentary issued January 28, 1931.

IN UNITED STATES DISTRICT COURT

[Title omitted]

INJUNCTION AFFIDAVIT—Filed Nov. 23, 1932

UNITED STATES OF AMERICA,
State of New York,
County of New York, ss:

Charles C. Jordan, being first duly sworn according to law, deposes and says:

1. That he is a Trust Officer of City Bank Farmers Trust Company, the plaintiff in the above entitled action; that he is authorized to make this injunction affidavit on its behalf and now so does; and that the matters herein averred, in so far as they may be on affiant's own knowledge are true and correct, and in so far as they may be upon information and belief, affiant believes them to be true and correct.

2. The above-named plaintiff was at all times hereinafter mentioned and still is a banking corporation with trust powers, duly organized and existing under the law of the State of New York.

3. Thomas B. Clarke, a citizen of the United States and a resident of, and legally domiciled in, the Borough of Manhattan, City, County and State of New York, died on the 18th day of January, 1931, leaving a will and codicils thereto which were duly admitted to probate as the Last Will and Testament of said Thomas B. Clarke by the Surrogates Court of New York County, to which court jurisdiction in that behalf appertained, on the 27th day of January, 1931, and letters testamentary thereunder duly issued to the said City Bank Farmers Trust Company, and said letters still remain in full force and effect.

[fol. 22] 4. At the time of said Thomas B. Clarke's death, there was on exhibition in the Pennsylvania Museum and School of Industrial Art at Philadelphia, a collection of seventy-nine (79) early American portraits which he had assembled over a period of twenty or thirty years and had loaned to the Museum on the occasion of the formal opening of the new Museum Building on the Parkway, in March, 1928. Said Thomas B. Clarke had no other property lo-

cated in Pennsylvania at the time of his death or taxable therein.

5. Said collection of paintings had an estimated market value on the date of death of $714,750.00.

6. Affiant is informed, believes and therefore avers that said collection of early American portraits had been loaned to the Museum for the purpose of free exhibition to the public, at the request of Dr. Fiske Kimball, Director of the Museum, who was an intimate friend of the deceased, Thomas B. Clarke. No consideration was paid or intended to be paid to said Thomas B. Clarke for such loan. There was no written agreement respecting the loan, which was entirely an oral transaction; but it was understood by and between said Thomas B. Clarke and said Dr. Fiske Kimball that the pictures should be returned to the owner at any time upon his request.

7. Affiant is informed, believes and therefore avers that on several occasions subsequent to the date of the original loan, said Thomas B. Clarke suggested the return of said paintings but under pressure from Dr. Fiske Kimball to extend his loan because of the great appreciation shown by the public thereof, said Clarke orally consented from time to time, to leave the paintings temporarily at the Museum, and thus, said portraits were there on display at the time of Thomas B. Clarke's death.

8. Affiant is informed by counsel for plaintiff, believes and therefore avers that under the terms of Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, an inheritance tax is imposed upon transfers of goods, wares or merchandise, "within this Commonwealth" belonging to a non-resident, at rates of 2 and 10% depending upon the relationship of the heirs, legatees and beneficiaries.

[fol. 23] 9. Under the Will of said Thomas B. Clarke, deceased, the aforesaid collection of portraits passed as a part of his residuary estate to lineals and collaterals so that, if said property had a taxable situs in Pennsylvania at the time of death, a Pennsylvania inheritance tax would arise in a sum exceeding $3,000.00.

10. Affiant is informed by counsel for plaintiff, believes and therefore avers, that under the terms of the Act of April 9, 1929, P. L. 343, Article XIV, sec. 1401, 72 P. S. § 1401, said inheritance tax is apparently a lien on the property transferred subject to such tax, from the date of settlement until the tax is settled or satisfied, such lien being limited to the property chargeable therewith.

11. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it is the duty of the defendant, Leon D. Metzger, to have the aforesaid property of plaintiff appraised, assessed and an inheritance tax thereon collected under the terms of the statute aforementioned and under the provisions of the Pennsylvania statutes providing for the collection of inheritance taxes on the estates of non-residents. Whether this be his legal duty or not, said Leon D. Metzger is actually proceeding at the present time to appraise, assess and collect such a tax thereon.

12. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it is the duty of the defendant, William A. Schnader, to enforce the statutes of Pennsylvania, and in particular the statute aforementioned which imposes a transfer inheritance tax upon property temporarily within the Commonwealth at the time of the owner's death and to proceed by suit at law or in equity to collect such taxes. Whether this be his legal duty under the statute or not, said William A. Schnader is threatening at the present time to proceed against the plaintiff for the collection of inheritance taxes upon the collection of portraits aforementioned.

13. On March 25, 1931, plaintiff, through its attorneys, disclosed the facts involved in this case to Mr. Linn L. Reist, the proper official in the Department of Revenue in charge of the appraisal, assessment and collection of inheritance taxes on non-resident estates, and by letters dated March 26th and April 27, 1931, to the defendant, William A. Schnader.

[fol. 24] 14. On April 7, 1931 plaintiff's attorneys in Philadelphia received the following notice:

"Commonwealth of Pennsylvania, Department of Revenue

Harrisburg, April 6th, 1931.

"This is full and sufficient notice that an official appraisement of the Pennsylvania assets belonging to the estate of Thomas B. Clarke, late of New York City, will be held in the office of the Secretary of Revenue on Monday [morning],* April 20th, 1931, at [eleven]* o'clock. P. M. 2-30

(S.) Harry T. Shadduck, Appraiser. Harry T. Shadduck."

15. Under date of April 13, 1931 defendant, William A. Schnader, addressed a letter to plaintiff's counsel in Philadelphia, insisting upon making a formal record by filing a return with the Department of Revenue and appearing before the appraiser at the hearing set and described in the preceding paragraph.

16. Pursuant to the said instructions of the defendant, William A. Schnader, plaintiff filed under protest with the Department of Revenue at Harrisburg, Pennsylvania, on April 20, 1931 a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions"; that the material parts of said return are as follows:

"5. That the total gross value of the real estate and the goods, wares and merchandise within the Commonwealth of Pennsylvania, and of the shares of stock of corporations of the Commonwealth of Pennsylvania and National Banking Associations located therein, of which the decedent died possessed, amounted to the sum of $—, a complete inventory whereof is hereto attached as Schedule D. See, however, item included in Schedule D under protest."

"Schedule D

"79 Portraits by early American artists loaned to Pennsylvania Museum of Art at Philadelphia, listed and de-

[*Erased in copy.]

[fol. 25] scribed in appraisal affidavit of Clarence J. Dearden hereto annexed $714,750.00.

"Some time prior to his death the decedent loaned the above described paintings to the Pennsylvania Museum of Art at Philadelphia for purposes of public exhibition. These paintings have been and still are exhibited in connection with a number of other portraits by early American artists which are the property of The Art House, Inc., a New York corporation controlled by the decedent. The loan of the decedent's paintings was made at the request of Mr. Fiske Kimball, Director of the Pennsylvania Museum, and the arrangements were informal. No written contract or other agreement was made and no definite time was fixed as the duration of the loan. No consideration was paid to Mr. Clarke for the loan. It was understood that Mr. Clarke could recall the paintings at any time. It happened that the paintings were still physically located in Philadelphia at the time of decedent's death, but it is respectfully submitted that they were only temporarily in the State of Pennsylvania and had no actual situs therein for purpose of taxation.

"The said 79 paintings were the only property of the decedent within the Commonwealth of Pennsylvania at the time of his death."

17. On April 20, 1931, the scheduled hearing was held in Harrisburg by Harry T. Shadduck, an appraiser in the Department of Revenue, since resigned, at which hearing plaintiff was represented by counsel and denied the right of the Commonwealth of Pennsylvania to appraise, assess and collect a tax upon the aforesaid collection of paintings temporarily in the Commonwealth of Pennsylvania at the time of decedent's death; that said appraiser referred the question of taxability of the aforesaid paintings to the Department of Justice, of which defendant, William A. Schnader, is head, for a determination; that pending such decision, he made no attempt to appraise the taxable value of the estate but postponed said hearing from day to day to a future undetermined day to be held after the Department of Justice had passed upon the legality of the proposed tax, and after notice to the parties.

18. Throughout the spring of 1932, in response to repeated requests of plaintiff for an immediate determina-

[fol. 26] tion of tax liability, the defendant William A. Schnader, orally advised plaintiff through its counsel that the Department of Justice was withholding determination of the legal question of liability pending an attempt on its part to work out a reciprocity agreement with the State of New York concerning the taxation of moveable tangible property under circumstances such as those involved in this case.

19. Meantime, plaintiff as Executor of the Estate of Thomas B. Clarke, deceased, had taken up the question of tax liability with the proper officials of New York State and was advised in a letter dated July 11, 1931 from the New York State Tax Commission that the said collection of 79 paintings had its situs in New York and was subject to the New York estate tax and that an extension of time to pay said tax pending the determination of the legal question involved in Pennsylvania had been refused. Pursuant to the demand made in said letter and in order to avoid the severe penalties imposed by the New York statute for non-payment within a year and a half of decedent's death, plaintiff paid to the State of New York on July 15, 1932 an estate tax amounting to $69,500 on the basis of a return which included therein the aforesaid collection of 79 paintings at the said value thereof in the amount of $714,500.00.

20. Immediately after such payment to New York, plaintiff again through its counsel took up the question with defendant, William A. Schnader, who orally advised plaintiff that its claim of non-taxability in Pennsylvania would be denied.

21. Affiant is informed by plaintiff's counsel, believes and therefore avers, that if the said section 1 of the Act of June 20, 1919, P. L. 521, as amended (paragraph 9, supra) be construed to impose an inheritance tax upon the transfer by death of the non-resident owner thereof, of the said 79 paintings, merely because they were temporarily "within this Commonwealth" at the time of decedent's death, it is unconstitutional in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 27] 22. Affiant is informed by plaintiff's counsel, believes and therefore avers, that if said statute be construed as not applying to property temporarily within the Commonwealth at death, then the threatened appraisal, assessment and collection by the defendants of said inheritance tax unconstitutionally deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

23. The threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the unlawful failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate for over a year and a half, has and is causing immediate irreparable injury to plaintiff in that it is seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and is preventing distribution of the estate to the legatees thereof who are entitled thereto, and is forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees; and in that the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the aforesaid 79 paintings and, consequently, interferes with the sale thereof as provided for in the will of testator.

24. Affiant is informed by plaintiff's counsel, believes and therefore avers, that it has no adequate remedy at law in that the statutes of Pennsylvania make no provision for bringing suit in the courts of that state for the refund of inheritance taxes overpaid but only provide for an application for a refund to an administrative board from whose decision there is no appeal and even if favorably decided by such board, no interest is allowed on any refund granted; in that the only remedy provided by the statutes of Pennsylvania prior to payment is a statutory form of appeal to the Dauphin County Court where a bond must be posted covering the full amount of tax and costs of suit and there is no provision for the restitution of the cost of such bond, which, in this case, would amount to a large sum of money, even if plaintiff should succeed before such Court; and in

[fol. 28] that the plaintiff has no adequate remedy at law in the federal courts' to which it is entitled because of diversity of citizenship between the parties to this suit.

All of the foregoing facts affiant avers he expects the plaintiff to prove at the hearing in this cause.

Charles C. Jordan.

Sworn to and subscribed before me this 18th day of November, 1932. John D. Graves, Notary Public, Queen Co*l*. No. 2159, Reg. No. 4914. Cert. filed N. Y. Co. 473, Reg. (Certificate of Court Clerk) No. 3-G-318. Comm. ex. 3/3/33.

Clerk's certificate to notary public omitted in printing.

In United States District Court

[Title omitted]

Injunction Affidavit—Filed Nov. 23, 1932

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

Fiske Kimball, being duly sworn according to law, deposes and says that he is Director of the Pennsylvania Museum of Art, Fairmount Park, Philadelphia, Pennsylvania, and has so been connected with the said institution from the year 1925; that the following is a true account of his relations with Mr. Thomas B. Clarke, Deceased, of New York City, N. Y., in connection with the collection of early American portraits on exhibition in the Museum at the time of Mr. Clarke's death.

I was intimately acquainted with the late Mr. Thomas B. Clarke from about the year 1920 down to the date of his death on January 18, 1931. I knew him in New York, where I lived for a time prior to coming to Philadelphia in 1925. I lunched with him frequently at "The Brook" club and we maintained a close friendship which was fostered by our mutual interests in the realm of art.

The new Art Museum was to open its doors in March, 1928, and I was anxious to supplement the exhibition of [fol. 29] paintings with loans from outside sources. I knew

about the collection of early American portraits which had been assembled by Mr. Clarke and had seen various selected groups from the collection at different times. The thought occurred to me that Mr. Clarke might lend his collection to the Museum as a personal favor to me and to assist in making the opening of the Museum an occasion of consequence in the world of art. I, therefore, made a social visit to Mr. Clarke in the month of November, 1927, and, very much to his surprise, requested that he lend his collection of portraits to the Museum temporarily for the purposes stated. I am sure that Mr. Clarke never contemplated making this loan prior to my request and I feel confident that he would not have made the loan were it not for our close friendship. After considering the matter for some time Mr. Clarke very kindly agreed to lend the pictures to the Museum at its opening for free exhibition to the public. There was no written agreement respecting the loan, which was entirely an oral transaction, except that the Museum issued its usual printed loan receipt, a copy of which is appended. There was no consideration for the loan. The term originally contemplated was about six months, although there was no definite understanding regarding the matter. It was understood that the pictures should be returned to Mr. Clarke at any time upon his request. The cost of shipping the pictures to Philadelphia, and the insurance thereon, was borne under an appropriation by the City of Philadelphia for the operation of the Museum, which is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania. The Museum considered the loan a great service to it, and elected Mr. Clarke an Honorary Benefactor. On March 26, 1928, I wrote Mr. Clarke the following letter:

"The Pennsylvania Museum

Office of the Director, Memorial Hall, Fairmount Park

March 26, 1928.

"Dear Mr. Clarke: At its recent meeting our Museum Committee, by special resolution, charged me with the agreeable task of conveying to you formally the thanks and appreciation of the Committee for your magnificent act in [fol. 30] lending to the Museum for its inaugural exhibition your unrivalled collection of early American paintings.

The Committee fully appreciates how great was the generosity of this loan of a collection never seen or shown before in its entirety, and one which surpasses in importance any other collection of American paintings, not only in private hands, but even in the hands of the greatest public institutions. I scarcely need to tell you how much delight it gives me to transmit this resolution to you, and to say how happy and proud we are on this day when the Museum is officially opened to have the Clarke collection as one of its principal treasures.

Sincerely yours, Fiske Kimball, Director.

Thomas B. Clarke, Esq., 22 East 35th Street, New York."

At the same time I secured substantial loans from other outside sources, largely through similar personal connections, to enrich the display at the Museum.

Not only this collection but other collections lent to the Museum at the time were retained by us longer than the original six months contemplated and, in fact, most of them were still on exhibition in the Museum at the time of Mr. Clarke's death. It is very common for loans to museums to be thus extended, with no intention of their being permanent. Recently, I ran through our records and found that in the case of twenty-six collections so lent and returned, the duration of the loan varied from one to forty years, the average time for the twenty-six collections being ten years. I purposely did not remind the lenders to the inaugural exhibition to withdraw their loans, and, if they brought the matter up, I would press them to extend their loans because of the great appreciation shown by the public in visiting the Museum. This was particularly true of the Clarke collection and from time to time I would ask Mr. Clarke to allow the pictures to continue to remain on view with us.

Mr. Clarke was a prominent figure in the world of art and was one of the best known persons in New York City. He was at one time Shep-erd of the Lambs Club and was founder of "The Brook" Club. He had been a collector of Chinese porcelains and other works of art prior to the time he started collecting American historical portraits, which ultimately absorbed all his interest and led him to sell other objects, so that he could purchase more and finer portraits. [fol. 31] It was well known among all persons interested in such subjects that he had this splendid collection of early

American portraits. He had permitted practically all of them to be exhiibted in selected groups from time to time in New York at the Century Club and the Union League Club.

As indicated herteofore, I have, by reason of my New York and other outside associations, been able to secure substantial loans of works of art from owners residing outside of the State of Pennsylvania. The value of such property so lent from time to time, much of which is still on exhibition in the Museum, has amounted to two or three million dollars at least. While such loans are customary among patrons of art, the Pennsylvania Museum of Art has perhaps been unusually successful, both as to the quantity and quality of pictures and other works of art, which it has thus secured temporarily from foreign owners, and no conclusion has even been drawn heretofore that such loans were anything but what they purported to be—temporary deposits for the benefit of the public interested in works of art.

(S.) Fiske Kimball.

Sworn to and subscribed before me this 17th day of November, 1932. My commission expires Mar. 2, 1933. W. A. Schrader, Notary Public. (Seal.)

In United States District Court

[Title omitted]

Motion for Interlocutory Injunction—Filed Nov. 23, 1932

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Upon the bill of complaint herein and upon the annexed affidavits of Charles C. Jordan, verified on the 18th day of November, 1932, and of Fiske Kimball, verified on the 17th day of November, 1932, and upon proceedings had herein, City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, the complainant above [fol. 32] named makes its application to your Honors for a writ of injunction enjoining and restraining, pending the final judgment in this action, and until the further order of this court, the defendants and each of them, and their —

and each of their deputies, officers, agents, servants and employees, and any and every person acting under and by virtue of their authority in the Department of Justice or in the Department of Revenue of the Commonwealth of Pennsylvania, from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended and supporting statutes, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of said taxes and from refusing to issue a tax waiver to plaintiffs covering the property set forth in said bill of complaint, and complainant prays your Honors to call to your Honors' assistance, to hear and determine this application, two other judges in accordance with the provisions of section 266 of the Judicial Code, and to expedite the hearing of this application, and set the same down for a hearing at the earliest practical date; and for such other and further relief as to the court may seem just and proper in the premises:

Dated at Philadelphia, Nov. 23, 1932.

(S.) Leslie M. Swope, (S.) Henry S. Drinker, Jr., Attorneys for Plaintiff, 1429 Walnut Street, Philadelphia, Pa.

IN UNITED STATES DISTRICT COURT

[Title omitted]

Ex Parte Order

RESTRAINING ORDER—Filed Nov. 25, 1932

This cause came on to be heard upon the motion of City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, the plaintiff in the above entitled cause, for an interlocutory injunction against the Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon [fol. 33] D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, the defendants in the above cause, on the verified bill of complaint and on the affidavits of Charles C. Jordan verified the 18th day of November, 1932,

and of Fiske Kimball, verified on the 17th day of November, 1932, and it appearing to this court that said Bill of Complaint seeks an interlocutory judgment restraining the enforcement of the Act of June 20, 1919, P. L. 521, as amended, by restraining the acts of the Honorable William A. Schnader, Attorney General, and of the Honorable Leon D. Metzger, Secretary of Revenue, in the enforcement of such statute upon the grounds of the unconstitutionality of said statute and on the unconstitutionality of any appraisement, assessment and collection of inheritance taxes against plaintiff pursuant to such statute, as provided by Section 266 of the Judicial Code, it is ordered, adjudged and decreed as follows:

1. The Honorable William H. Kirkpatrick, Judge of the above court, hereby calls to his assistance to hear and determine the application for an interlocutory injunction in this case the Honorable J. Whitaker Thompson, Judge of the Circuit Court of Appeals for the Third Circuit, and the Honorable Oliver B. Dickinson, Judge of the District Court of the United States for the Eastern District of Pennsylvania.

2. It is further ordered, adjudged and decreed, that said defendants appear to show cause, if any they have, on December 2, 1932, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, in Room —, Federal Court Building, Philadelphia, why an interlocutory injunction should not issue as prayed for in said bill of complaint, enjoining said defendants and each of them, and their and each of their deputies, officers, agents, servants and employees, and any and every person acting under and by virtue of their authority in the Department of Justice or in the Department of Revenue of the Commonwealth of Pennsylvania, from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken, under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended, and supporting statutes, and from prosecuting or bringing [fols. 34–36] any action at law or in equity against the plaintiff for the collection of said taxes and from refusing to issue a tax waiver to plaintiffs covering the property set forth in said Bill of Complaint.

3. It appearing that immediate and irreparable damage will be caused to said plaintiff by reason of the threat of the said appraisement, assessment and collection of the aforesaid inheritance tax by the defendants and the failure and refusal of the defendant, Leon D. Metzger, to issue a waiver of taxes in this estate, in that such threat and acts are seriously interfering with the proper administration of the Thomas B. Clarke Estate in the Surrogate's Court of New York and are preventing distribution of the estate, and are forcing the plaintiff as executor to maintain large cash reserves at a low rate of interest to cover possible taxes in Pennsylvania and the costs of litigation there, including the cost of bonds and of attorneys' fees and in that, once appraised and assessed, the threatened tax constitutes a possible lien and, therefore, cloud on the title of plaintiff to the property involved and interferes with the proposed sale thereof, unless a temporary restraining order is issued ex parte and without notice against said defendants until the hearing of said application for an interlocutory injunction, it is further ordered, adjudged and decreed that said, the Honorable William A. Schnader, Attorney General, and the Honorable Leon D. Metzger, Secretary of Revenue, be enjoined from in any way completing or attempting to complete the appraisal, assessment and collection of inheritance taxes from the plaintiff now being undertaken under the alleged authority of the Act of June 20, 1919, P. L. 521, as amended, and supporting statutes, and from prosecuting or bringing any action at law or in equity against the plaintiff for the collection of said taxes covering the property set forth in said Bill of Complaint, until said hearing on said application for an interlocutory injunction. Bond sur restraining order in $1,000 to be filed.

Dated at Philadelphia, November 25, 1932, at 10 o'clock A. M.

(S.) W. H. Kirkpatrick, District Judge.

[fol. 37] In United States District Court

[Title omitted]

Answer—Filed Dec. 19, 1932

To the Honorable the Judges of the said Court:

William A. Schnader and Leon D. Metzger, the defendants above named, saving and reserving to themselves all

benefit and advantage of exceptions to the manifold errors, uncertainties and other imperfections in the plaintiff's Bill of Complaint, for answer thereto respectfully show:

1. The averments of the first paragraph of the Bill of Complaint are admitted.

2. The averments of the second paragraph of the Bill of Complaint are admitted.

3. The averments of paragraph 3 of the Bill of Complaint are admitted.

4. The averments of paragraph 4 of the Bill of Complaint are admitted.

5. The averments of paragraph 5 of the Bill of Complaint are admitted.

6. Defendants are advised and believe that the facts stated in paragraph 6 of the Bill of Complaint are true. In further answer defendants aver that prior to their shipment to the Pennsylvania Museum in Philadelphia in March, 1928, only five of the portraits owned by Thomas B. Clarke had been stored in Mr. Clark's residence at 22 East Thirty-fifth Street, New York City. Ten of these portraits had been on exhibition at the Century Association, New York City, and the remaining 63 portraits had been stored in the warehouse of the Lincoln Storage Warehouse Company, a corporation engaged in the business of storing goods for hire, in New York City. When the pictures were sent to the Pennsylvania Museum in Philadelphia, [fol. 38] Mr. Clarke surrendered his lease for storage space at the warehouse of the Lincoln Storage Warehouse Company, and from that time until the date of his death on January 18, 1931, did not pay any rentals for storage space in New York, or any other storage charges on account of these pictures. Although it would have been possible for Mr. Clarke at any time to re-engage storage space at the Lincoln Storage Warehouse Company, or at other warehouses in the City of New York, Mr. Clarke did not own, lease, or in any other way reserve or control, any storage space adequate for the storage of these pictures in New York City during the period from March, 1928, until his death on January 18, 1931.

On April 29, 1929, Mr. Clarke lent four of the portraits to the Virginia Historical Society for an exhibition at Richmond, Virginia, but these four portraits were returned to the Pennsylvania Museum in Philadelphia on May 25, 1929. With this exception, Thomas B. Clarke permitted all of the 79 portraits to remain at the Pennsylvania Museum in Philadelphia continuously from March, 1928, until the date of his death on January 18, 1931.

7. In answer to the averments of paragraph 7 of the Bill of Complaint, defendants aver that the collection of 79 portraits owned by Thomas B. Clarke had an estimated value on the date of his death of at least $714,750.

8. Defendants are advised and believe that the facts averred in paragraph 8 of the Bill of Complaint are true. In further answer defendants aver that Thomas B. Clarke permitted the 79 portraits to remain at the Pennsylvania Museum in Philadelphia from March, 1928, until his death on January 18, 1931. Defendants further aver that about a year after the pictures had been placed on exhibition at the Pennsylvania Museum in Philadelphia, Thomas B. Clarke, at the solicitation of Dr. Fiske Kimball, Director of the Museum, wrote to Dr. Kimball stating that if the latter could secure a donor who would present Mr. Clark's entire collection of early American portraits (consisting of these 79 portraits, and 85 other portraits owned by the Art House, a New York corporation whose entire capital stock was owned or controlled by Mr. Clarke, and which were also on exhibition at the Pennsylvania Museum) to the Museum, he would sell the collection as a whole to such [fol. 39] donor at a stated price. It was understood between Mr. Clarke and Dr. Kimball that Mr. Clarke would allow the portraits to remain at the Museum in Philadelphia during such reasonable time as Dr. Kimball might require to find such proposed donor. Subsequently, on May 21, 1930, Mr. Clarke again wrote to Dr. Kimball stating that the above arrangement would terminate on June 17, 1930. Defendants further aver, however, that even after the expiration of the arrangement permitting Dr. Kimball to find a donor to present the pictures to the Pennsylvania Museum in Philadelphia, and until the time of Mr. Clarke's death on January 18, 1931, Thomas B. Clarke was willing to dispose of his pictures to any purchaser who would buy

the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution, and who would pay the price set upon it by Mr. Clarke.

In further answer defendants aver that at no time prior to his death on January 18, 1931, did Mr. Clarke make any definite plans for the return of these pictures to New York, or (except as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum of Art to any other place.

9. Defendants are advised and believe that the facts averred in paragraph 9 of the Bill of Complaint are true. In further answer defendants aver that during the period from March, 1928, until the date of his death on January 18, 1931, Thomas B. Clarke never made any definite plans for the return of his paintings to New York, or (except as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum of Art in Philadelphia to any other place. At the time of the death of Thomas B. Clarke on January 18, 1931, the pictures owned by him (excepting the four portraits which had been sent to Richmond, Virginia, for about a month in 1929, as set forth in paragraph 6 of this Answer) had been physically located within the Commonwealth of Pennsylvania for a period of two years and ten months.

10. Defendants are advised and believe that the facts averred in paragraph 10 of the Bill of Complaint are true. Defendants deny, however, that any of these averments are in any way material to the issues presented by the plaintiff's Bill of Complaint.

[fol. 40] 11. The averments of paragraph 11 of the Bill of Complaint are admitted.

12. The averments of paragraph 12 of the Bill of Complaint consist of quotations from statutes of the Commonwealth of Pennsylvania and certain conclusions of law derived therefrom by plaintiff. Therefore, defendants are advised by counsel, believe and aver that they are not required to answer the averments of paragraph 12 of the Bill of Complaint.

13. Defendants are advised by counsel, believe and, therefore, aver that the averments of paragraph 13 of the

Bill of Complaint are conclusions of law which do not require any answer.

14. Defendants are advised by counsel, believe and, therefore, aver that the averments of paragraph 14 of the Bill of Complaint are conclusions of law which do not require any answer by the defendants.

15. Defendants admit that the plaintiff, through its attorneys, conferred with a representative of the Department of Revenue on or about March 25, 1931, and at that time made certain statements to the Department of Revenue upon which plaintiff based a claim for exemption from tax. Defendants also admit that notice of plaintiff's claim was given to the defendant, William A. Schnader, by letters dated March 26 and April 27, 1931.

16. The averments of paragraph 16 of the Bill of Complaint are admitted.

17. The averments of paragraph 17 of the Bill of Complaint are admitted.

18. Defendants admit that plaintiff filed under protest with the Department of Revenue at Harrisburg, on or about April 20, 1931, a so-called "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions", and that the said application contained the statements quoted in paragraph 18 of the Bill of Complaint.

19. The averments of paragraph 19 of the Bill of Complaint are admitted.

[fol. 41] 20. The averments of paragraph 20 of the Bill of Complaint are admitted. Defendants deny, however, that the facts averred therein are material to the issues presented by plaintiff's Bill of Complaint.

21. Defendants are advised and believe that the facts averred in paragraph 21 of the Bill of Complaint are true. Defendants deny, however, that any of the facts so averred are in any way material to the issues presented by the plaintiff's Bill of Complaint. In further answer defendants aver that at the time of the death of Thomas B. Clarke on January 18, 1931, the 79 paintings were physically located in Pennsylvania, and had been on exhibition within the Commonwealth of Pennsylvania for a period of nearly

three years. Defendants aver that, under the facts set forth in the Bill of Complaint and in this Answer, these 79 portraits had an actual situs in Pennsylvania, and that they were subject to the transfer inheritance tax imposed by the Commonwealth of Pennsylvania, and were not subject to any such transfer inheritance tax in the State of New York. Defendants further aver that the plaintiff paid such transfer inheritance tax to the State of New York with full knowledge of the possibility that a transfer inheritance tax upon these paintings might be demanded by the Commonwealth of Pennsylvania.

22. The averments of paragraph 22 of the Bill of Complaint are admitted.

23. Defendants are advised, believe and, therefore, aver that the allegations contained in paragraph 23 of the Bill of Complaint are argumentative, and contain only conclusions of law, which do not require any answer by defendants. Defendants aver, however, that no attempt has been made by them or by any other representatives of the Commonwealth of Pennsylvania in this case to interpret Section 1 of the Act of June 20, 1919, P. L. 521, as amended, as imposing an inheritance tax upon the transfer by death of the nonresident owner thereof of any property which was only temporarily within the Commonwealth of Pennsylvania at the time of the death of the owner thereof. Defendants aver that the 79 paintings owned by Thomas B. Clarke at the time of his death had been physically located within the Commonwealth of Pennsylvania for a period of nearly three years prior to Mr. Clarke's death. Defend- [fol. 42] ants further aver that, under the facts set forth in the Bill of Complaint and in this Answer, these 79 paintings were not temporarily within the Commonwealth of Pennsylvania, but had acquired an actual situs in Pennsylvania. Defendants deny that Section 1 of the Act of June 20, 1919, P. L. 521, as amended, in any way deprives the plaintiff of its property without due process of law, or in any way denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

24. Defendants are advised, believe, and therefore aver that the averments contained in paragraph 24 of the Bill of Complaint are argumentative, and contain only conclu-

sions of law, which do not require any answer by the defendants. Defendants deny, however, that the appraisal, assessment and collection by the Commonwealth of Pennsylvania of an inheritance tax upon the transfer of the 79 paintings owned by Thomas B. Clarke, and located within the Commonwealth of Pennsylvania at the time of his death, unconstitutionally deprives the plaintiff of its property without due process of law, or denies to the plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. In further answer defendants aver that under the facts set forth in the Bill of Complaint and in this Answer the 79 paintings owned by Mr. Clarke were not temporarily within the Commonwealth of Pennsylvania at the time of his death, but had acquired an actual situs in Pennsylvania. The pictures had been physically located within the Commonwealth of Pennsylvania for nearly three years prior to Mr. Clarke's death. At no time prior to his death on January 18, 1931, did Thomas B. Clarke make any definite plans for the return of the pictures to New York, or (except in the case of the 4 portraits sent to Richmond, Virginia, for one month in 1929, and subsequently returned to Philadelphia, as set forth in paragraph 6 of this Answer) for their removal from the Pennsylvania Museum in Philadelphia to any other place.

25. Defendants are advised and believe that the averments of paragraph 25 of the Bill of Complaint consist of inferences of fact and conclusions of law which do not require any answer by defendants.

[fol. 43] 26. Defendants deny that the plaintiff has no adequate remedy at law. On the contrary, defendants aver that the plaintiff has a full, adequate and complete remedy at law duly provided by the statutes of the Commonwealth of Pennsylvania permitting the plaintiff to appeal to the Court of Common Pleas of Dauphin County from any assessment made against it by the defendants.

27. In further answer to plaintiff's Bill of Complaint, defendants aver that this suit is brought against defendants in their official capacities as Attorney General and Secretary of Revenue, respectively, of the Commonwealth of Pennsylvania, and that, therefore, the suit is brought against the Commonwealth of Pennsylvania, contrary to

the provisions of the Eleventh Amendment to the Constitution of the United States of America. Therefore, defendants aver that this Honorable Court is without jurisdiction to entertain the plaintiff's suit.

Wherefore defendants pray that they may be hence dismissed with their reasonable costs and expenses in this behalf incurred.

Wm. A. Schnader, Leon D. Metzger.

Duly sworn to by Leon D. Metzger. Jurat omitted in printing.

In United States District Court

[Title omitted]

Stipulation as to Certain Facts—Filed Jan. 5, 1933

It is stipulated and agreed between counsel for plaintiff and defendants in the above case that the case may be disposed of by the Court as of final hearing on the facts alleged in the Bill and Answer with the following additional facts, which are, for the purposes of this case, admitted by both parties to be correct:

Thomas B. Clarke, the testator, was 82 years of age at the time of his death; it was understood between Mr. Clarke and Dr. Kimball that the Philadelphia Museum of Art should pay all expenses directly incident to Mr. Clarke's loaning the pictures to the Museum, as averred in the Bill, and the Museum actually did pay the expenses of transportation from New York, including insurance in transit; [fol. 44] the New York law provides a procedure for refund of inheritance taxes improperly paid, but this procedure does not provide for a refund of interest on the tax; at the time of Mr. Clarke's death all the beneficiaries of his Estate were non-residents of Pennsylvania. Prior to the loan to the Philadelphia Museum of Art here involved, Mr. Clarke had permitted practically all of these portraits to be exhibited in selected groups from time to time in New York at the Century Club and at the Union League Club, of each of which clubs Mr. Clarke was a member. In this way all the 79 pictures had been exhibited

in New York, in each case with selected groups of the 85 portraits belonging to Art House, Inc., but not as a unit nor in connection with the entire other 85 pictures belonging to Art House, Inc. The number of portraits so exhibited from the personally owned collection of 79 never exceeded fifteen at any one time, although, by reason of additions from Art House, Inc., the entire group so exhibited was usually larger. For several years before 1928, the greater part of the pictures had been in storage, selected groups going out and in for exhibition purposes.

H. S. Drinker, Jr., Attorney for Plaintiff. Wm. A. Schnader, Lucien B. Carpenter, Attorneys for Defendants.

December 20, 1932.

In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and The Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of-Pennsylvania

Before Thompson, C. J.; Dickinson, and Kirkpatrick, D. JJ.

Opinion sur Pleadings and Proofs—Filed March 24, 1933

The plaintiff, the executor of a non-resident decedent, has brought this suit in equity to restrain the Pennsyl- [fol. 45] vania taxing authorities from appraising for inheritance tax a collection of paintings, the property of the decedent, physically located within the state of Pennsylvania, and from taking steps to collect the tax. The plaintiff alleges that the pictures were in Pennsylvania for a temporary and transient purpose only and are not taxable there.

The basis for equity jurisdiction is asserted in paragraph 25 of the bill. It is there set forth that the threatened collection of the tax is causing immediate and irreparable injury in that it is (1) seriously interfering with the administration of the estate and delaying distribution, (2) compelling the plaintiff to maintain large cash reserves at low interest rates against the possibility of having to pay the tax, and, (3) creating a "possible lien" and therefore clouding the title of the plaintiff to the paintings.

The answer does not challenge these statements but merely states that they are inferences of fact and conclusions of law which do not require answer. The answer does however aver that the plaintiff has an adequate remedy at law and specifies the right of appeal to the state courts from the assessment, granted by the Pennsylvania statute.

The law is settled beyond all question that there must be some ground for invoking the equity powers of the court, other than the illegality or unconstitutionality of the tax. Boise Artesian etc. Water Co. vs. Boise City, 213 U. S. 276. Such ground among others has been found in former decisions in the creation of a cloud upon title (Shaffer vs. Carter, 252 U. S. 37; Union Pacific Railway Company vs. Cheyenne, 113 U. S. 516; Pacific Express Co. vs. Seibert, 142 U. S. 339; Ogden City vs. Armstrong, 168 U. S. 224; Ohio Tax Cases, 232 U. S. 576; Green vs. Louisville & Interurban R. R. Company, 244 U. S. 499).

No decision has been called to our attention in which a possible lien upon a specific article or articles of personal property has been held to constitute a cloud upon title which will warrant injunctive relief. In all the cases cited real estate was involved and the clearing of real estate titles was the historical basis of this branch of the jurisdiction. In many of the cases the unpaid tax became, by the law of the state, a lien upon all of the taxpayer's property within the state, whether subject to the tax or not. That [fol. 46] this would cause irreparable injury, particularly where the plaintiff is a railroad company or, as in Shaffer vs. Carter, supra, the owner of numerous gas and oil mining leases, is plain. That situation does not exist here however. The Pennsylvania Act of April 9, 1929, Purdon, Title 72, Sec. 1401, imposing a lien for unpaid taxes expressly provides, "but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith."

Whether the want of an adequate remedy at law be viewed as constituting in itself a ground of equitable jurisdiction or whether the existence of such remedy be taken as limiting a jurisdiction which might otherwise attach, this court cannot proceed if there is such a remedy. The provision of R. S. 70, "Suits in equity shall not be sustained in any court of the United States where a plain, adequate and complete remedy may be had at law" must be observed.

"The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." Matthews vs. Rodgers, 284 U. S. 521, 525.

"If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection sua sponte". Singer Sewing Machine Company vs. Benedict, 229 U. S. 481, 484. See also Twist vs. Prairie Oil & Gas Co., 274 U. S. 684, 690; Matthews vs. Rodgers, supra. Where the objection is not presented by the defendant in limine it may be treated as waived, provided the existence of a legal remedy is not obvious. In view of the fact that the answer in this case explicitly raises the objection, we do not think that the hope expressed by the defendant's counsel at the oral argument that this Court would find it possible to take jurisdiction was intended as a waiver or, even if so intended can be treated as such.

The laws of Pennsylvania do not extend to the taxpayer the remedy of paying the tax under protest and bringing [fol. 47] suit in the courts for its recovery—a procedure which where *it* clearly available, has always been treated as affording a complete and adequate remedy at law. (Shelton vs. Platt, 139 U. S. 591; Singer Sewing Machine Company vs. Benedict, supra; The Henrietta Mills vs. Rutherford County, N. C. 281 U. S. 121; Matthews vs. Rodgers, supra; Stratton vs. St. Louis, etc., Ry. Company, 284 U. S. 530). But neither do they give to the State authorities the coercive measures of distraint and levy without a

prior judicial determination of the legality and amount of the tax, if the taxpayer desires it and, therefore, he has a completer remedy than by suit to recover a tax paid.

Under the law of Pennsylvania, the first step for the assessment of a transfer inheritance tax upon the estate of a non-resident decedent is an appraisement of the property which it is proposed to tax by an agent of the Department of Revenue, of which appraisement notice must be given to all interested parties. The act then provides that, "Any person not satisfied with the appraisement * * * may appeal * * * to the court of common pleas of Dauphin County, on paying or giving security to pay all costs together with whatever taxes shall be fixed by the court. Upon such appeal, the court may determine all questions of valuation, and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court". (Act of April 9, 1929, P. L. 343. Purd. Tit. 72. Sec. 1202.)

The procedure for the collection of the tax as finally determined, is also defined by the Act of April 9, 1929, above referred to. After the tax has remained due and unpaid for a year the Department of Justice acting on behalf of the Department of Revenue may apply to a court of Common Pleas "by bill or petition, to enforce payment of the same, whereupon the court, having caused notice to be given * * * shall proceed according to equity to make such decree or order for the payment of the tax out of such property, as shall be just and proper". Or, at its discretion, the Department of Justice may bring "in any court of the Commonwealth having jurisdiction, any appropriate suit at law or in equity, by action of assumpsit or otherwise, for any * * * taxes due the Commonwealth". Purdon, Tit. 72, Sec. 1406. In such suit or where the pro-[fol. 48] cedure is by petition, the taxpayer may make the defense that the taxing statute is unconstitutional or that the tax was illegally assessed by reason of the non-taxable situs of the property or any other defense which he may have.

In Keokuk & Hamilton Bridge Company vs. Salm, 258 U. S. 122, the Supreme Court considered procedure provided by the statutes of Illinois, essentially the same as the foregoing in all respects, and held that "The Law of Illinois affords ample opportunity to question the amount and

validity of an assessment both before administrative tribunals and in its courts", and upheld a decree of the District Court dismissing the bill because of an adequate remedy at law. True, that was a case in which it was admitted that some tax was due, the basis of the complaint being discriminatory over-valuation, and the Supreme Court held that another ground for dismissing the bill was the failure of the taxpayer to have paid or tendered the amount of the taxes confessedly due. Nevertheless the decision rested upon both grounds and appears to be dispositive of the question of an adequate remedy at law in this case.

In general, injunctive relief will be denied against threatened action at law where the matters relied upon would be a complete defense to the action and where the plaintiff's right will be fully protected by a successful defense. 21 C. J. 68. A judgment in such action would be as complete and adequate a remedy as an injunction. Grand Chete vs. Winegar, 15 Wall. 373.

We are not unmindful of the rule of Smyth vs. Ames, 169 U. S. 466; Chicago, etc., Ry. Company vs. Osborne, 265 U. S. 14, and many other cases to the effect that the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts (Risty vs. Chicago etc. Ry. Company, 270 U. S. 378) and, of course, a non-resident sued by the state of Pennsylvania for tax cannot remove the cause to the District Court upon the ground of diversity of citizenship. (Nevada-California Power Company vs. Hamilton, 235 Fed. 317.) But he may raise the constitutionality of the statute or the rights asserted under it by way of defense, and, as was pointed out in Matthews vs. Rodgers, supra, "If the remedy at law [fol. 49] (given by the state law) is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court (the Supreme Court of the United States) for review if any federal question be involved. * * *"

We do not think that the remaining allegations of the bill—as to possible delay in the administration of the estate and the inconvenience of being compelled to keep enough money on hand to meet the tax if it should be found to be valid—set forth any irreparable injury. These are ordi-

nary incidents in the administration of any estate in which disputed questions have to be litigated. There may conceivably be situations in which delay would cause irreparable injury to the estate, but no circumstances suggesting anything of the sort in this case are averred, and we must assume that the case is the ordinary one in which delay and the withholding of funds from distribution for a period of time is by no means unusual or particularly serious.

The conclusion is that the bill must be dismissed for want of equitable jurisdiction in this Court.

By the Court:

W. H. Kirkpatrick, J.

In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

Decree—Filed April 11, 1933

And now, to-wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

[fol. 50] I. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff.

By the Court:

J. W. Thompson, Circuit Judge.

[fol. 51] IN UNITED STATES DISTRICT COURT

MANDATE—Filed Jan. 15, 1934

UNITED STATES OF AMERICA, ss:

(Seal.)

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you, or some of you, in a cause between City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Plaintiff, and The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Defendant, In Equity, No. 7395, wherein the final decree of the said District Court, entered in said cause on the 11th day of April, A. D. 1933, is in the following words, viz:

"And now, to wit, April 11th, 1933, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. The Bill of Complaint be, and is hereby dismissed for want of equitable jurisdiction and at the cost of the plaintiff.

By the Court:

J. W. Thompson, Circuit Judge."

as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 52] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this court that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the said plaintiff, City Bank Farmers Trust Company, Executor, etc., recover against the said defendants One Hundred and Eighty-five Dollars and Thirty-five Cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said District Court with instructions to reinstate the bill and proceed to a hearing upon the merits.

January 8, 1934.

[fol. 53] You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal, notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the fifteenth day of January, in the year of our Lord one thousand nine hundred and thirty-four.

Costs of Plaintiff:

Clerk	$65.90
Printing Record	99.45
Attorney	20.00
	$185.35

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 54] In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased,

vs.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania

Opinion

Sur Pleadings and Proofs—Filed March 29, 1934

Thompson, C. J., and Dickinson and Kirkpatrick, D. JJ.

Opinion of the Court by Kirkpatrick, J.:

This case involves the taxable situs of tangible personal property. The occasion for imposing the tax is the transfer of the property by death of the owner.

In the case of intangibles the law is now well settled that the state in which the owner is domiciled and no other may impose an inheritance tax. Farmers Loan Company vs. Minnesota, 280 U. S. 204; First National Bank vs. Maine, 284 U. S. 312. The facts upon which these decisions were rendered did not involve the taxation of tangibles. In the opinion of the Minnesota case the Court made it perfectly clear that the taxable situs of such property depends upon entirely different considerations.

[fol. 55] The outstanding decisions governing the taxation of tangible personalty are Gromer vs. Standard Dredging Company, 224 U. S. 362; Frick vs. Pennsylvania, 268 U. S. 473; and Blodgett vs. Silberman, 277 U. S. 1. The first of these cases recognized and applied the general rule "than tangible personal property is subject to taxation by the State in which it is, no matter where the domicile of the owner may be". The Court pointed out that there was nothing in the case to show that the property (certain machinery and boats) was only temporarily within the territorial limits of the jurisdiction which proposed to tax it. The import of the decision is that where nothing appears

in the case beyond the facts that the property is in one jurisdiction and the domicile of the owner in the other the property is taxable where it is. It was really upon this point that the Court divided, the minority holding in substance that the presumption is the other way, that all personal property is ordinarily taxable at the owner's domicile and that if it is to be taxed somewhere else it must be shown that its location in the taxing state was not "of a temporary or fleeting character".

In the Frick case the expression "where it is" as defining the taxable situs of such property was exchanged for "actual situs". Actual situs means a little more than simply the place where property is. It excludes the idea of mobile personal property which happens to be in the course of transit in or through the taxing state at the moment when the occasion for taxation arises. It also excludes the [fol. 56] idea of property which for some definite purpose of its owner has come to rest within the boundaries of the taxing state for a brief and limited time. In either of these cases its location there would be of a temporary or fleeting character.

It does not however demand or necessarily involve any idea of permanency or a permanent location in the taxing state. In the Minnesota Case the Court, in discussing the Frick Case, said that it had been there held that no state could "impose death duties reckoned upon the value of tangibles located permanently outside her limits". But as a matter of fact the decision in the Frick Case had gone much further than that, and in its later opinion in First National Bank vs. Maine the Court again reviewed the Frick Case and stated its doctrine as being "the power to tax is exclusively in the state where the property has an *actual situs*".

In the true sense, permanency of location can never be predicated of personal property. The pictures which Mr. Frick housed in the specially built gallery or museum in New York were probably as permanently located where they were as any personal property could ordinarily be, but they might have been removed at any time without difficulty, and there was certainly nothing permanent about the location of the automobiles in his New York garage or the farming implements on his Massachusetts estate. Even less permanent was the location of the money in the safe

deposit box in the Blodgett Case. To attempt to identify [fol. 57] actual situs with permanent location as applied to personal property is only productive of confusion of thought.

If, then, actual situs is not permanent situs, we must turn to the facts of the Frick and Blodgett Cases to ascertain what it is. From the Frick Case we learn (among other things) that, where the owner has residences in two or more states, furniture, automobiles, farming implements etc. located at such residences (though not the domiciliary one) have an actual situs at the place where they are. From the Blodgett Case it appears that bank notes and coin in a safe deposit box (there being nothing to show us for what purpose they were there or how long they had remained) also have an actual situs in the state in which they are, though the owner is domiciled elsewhere.

In the case at hand the following facts appear with regard to the portraits which are the subject of the tax: (1) They had been physically located in Pennsylvania two years and ten months. (2) At the time of the owner's death no definite plans had been made for their removal and no definite limit had been placed by the owner upon the duration of their stay in Pennsylvania.

If there were no other facts in the case it would be beyond dispute that the portraits had an actual situs in Philadelphia. To show that they had something less than that, the complainant points out (1) that the pictures were loaned, without consideration, to the Pennsylvania Museum for the purpose of exhibition, for the pleasure and education of the public; (2) that the loan was not a "permanent loan" after the manner of many loan exhibitions, but that [fol. 58] it was understood that the pictures would be returned to the owner on his request, which might be made at any time; and (3) that the owner, after two years and two months, had stated that the arrangement would terminate on a fixed day about a month later, but that the pictures were allowed to remain thereafter until his death in the hope (apparently entertained by both the owner and the museum authorities) that a donor could be found who would buy the paintings and present them to the Museum.

As we interpret the meaning of actual situs, it is not destroyed or impaired by these facts. Certainly it must be conceded that the location in Pennsylvania was not perma-

nent, but as has been stated it need not be. Perhaps it might be said that it was temporary, although it was only such in the sense that the owner reserved the title and the right to remove the property when he saw fit—a right which he did not exercise for nearly three years and which, so far as the record shows, he had no definitely formed intention of exercising at any predictable time. The portraits were safely housed in Pennsylvania and were under the protection of the laws of that state. They had been taken out of storage to be placed where they were. They were there for an indefinitely prolonged stay and that, we think, gives them an actual situs.

It may be conceded that the idea of a sale, though by no means to be disregarded, was secondary and remote and [fol. 59] that the portraits were in Pennsylvania primarily for the purpose of being exhibited to the public. If it had appeared that the exhibition was for a specific occasion or for a brief and limited time I do not say that this fact would not have been of importance as giving a transitory character to their location here. But when the stay is of unlimited duration or, as suggested, indefinitely prolonged, the mere fact that its main purpose is public exhibition is not enough to destroy the actual situs of the property.

We would readily agree that if these portraits could be endowed with personality the facts appearing in the record would not be sufficient to show an intention upon their part to change their domicile from New York to Pennsylvania. This is practically the test which the complainant urges upon us. But it is also in substance the view that was urged by the minority and rejected in Gromer vs. Standard Dredging Company, supra. The law as set forth in that case and uniformly followed with regard to tangibles is that the inquiry is not whether the property has departed from its, or its owner's domicile but whether the place where it is, regardless of the owner's domicile, is its actual situs.

The bill may be dismissed.

[fol. 60] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT

(1) In March, 1928, Thomas B. Clarke, a citizen and resident of New York City, then in his 80th year, at the

request of his intimate friend Dr. Fiske Kimball, Director of the Pennsylvania Museum, loaned to the Museum his unique collection of early American portraits.

(2) The arrangement between Clarke and Kimball was wholly oral. No consideration was paid or intended to be paid to Clarke for the loan. It was understood that the pictures would be returned to Clarke at any time on his request.

(3) On several occasions subsequent to the date of the original loan in March, 1928, Clarke suggested the return of the paintings, but under pressure from Kimball to extend his loan because of the great appreciation shown by the public, Clarke orally consented from time to time to leave the paintings temporarily at the Museum and thus when Clarke died on January 18, 1931, they were there on display, returnable on demand.

(4) The 164 paintings comprising the loan had been collected by Clarke over a period of twenty or thirty years. 85 of them were owned by a New York corporation, The Art House, Inc., of which Clarke was the sole stockholder. Of the remaining 79 owned by Clarke personally, 5 were at the time of the loan in his New York residence, 10 were on exhibition at the Century Club in New York, and the balance, 64, were in storage in New York City. All of the 79 owned by Clarke personally, which at the time of the loan had an unquestioned situs in New York City, had from time to time been exhibited there, in each case with selected groups of the 85 belonging to The Art House, Inc., but not [fol. 61] as a unit or in connection with the entire 85

(5) In the spring of 1929, after the pictures had been at the Museum for about a year, Clarke, at Kimball's solicitation, wrote Kimball that if Kimball could secure a donor who would present the entire collection of 164 paintings to the Museum, Clarke would sell them as a whole to such donor at a stated price, it being then understood that Clark would allow them to remain at the Museum for such reasonable time as Kimball might require to secure such donor. Subsequently, on May 21, 1930, Clarks again wrote Kimball stating that the above arrangement would terminate on June 17, 1930. From the latter date, at Kimball's solicitation, the pictures were permitted by Clarke to remain at

the Museum until his death on January 18, 1931, but with the understanding that they would be returned to Clarke in New York at any time on his request. During this time, Mr. Clarke, although not obligated to sell or otherwise to dispose of them, was willing to sell to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution.

(6) When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space in a New York warehouse where 64 of the pictures were at that time. Thereafter, Clarke paid no rentals for storage space or any other storage charges on account of these pictures, nor did he reserve or control any storage space adequate for the storage of the pictures in New York from March, 1928, [fol. 62] until the time of his death on January 18, 1931. Such storage space was, however, always readily obtainable during the entire period of the loan.

(7) While the paintings thus remained at the Museum, Clarke made no definite plans or request for their return to New York or their removal to any other place, except that on April 29, 1929, four of them were sent at his request to the Virginia Historical Society, for an exhibition at Richmond, which four were returned to the Philadelphia Museum on May 25, 1929.

(8) The Museum is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania and has secured a substantial portion of the works of art therein displayed to the public by voluntary loans from non-resident philanthropists, none of which were intended or regarded as permanent loans to the Museum. It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans.

(9) Following Clarke's death the controversy arose as to the power of the State of Pennsylvania to impose an inheritance tax on the 79 paintings belonging to the Estate of Mr. Clarke, the question being as to which of the two states, Pennsylvania or New York, was entitled to the tax. After some attempt by the Pennsylvania authorities to work out

a reciprocity agreement with New York, complainant paid (under protest) the New York Estate Tax amounting to [fol. 63] $69,500, and Mr. Schnader having advised that complainant's claim of non-taxability in Pennsylvania would be denied, complainant brought the present bill.

At the prior hearing, this Court dismissed the bill on the ground that complainant had an adequate remedy at law. On appeal the Supreme Court reversed the judgment and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits.

(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that State at that time.

CONCLUSION OF LAW

The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed.

By the Court:

——— ———.

———

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

DISSENTING OPINION

DICKINSON, J., dissenting:

The events attending the trial and ruling in this cause evidence that it is what is called a "close case". The turning point in it is really a fact finding. There is nothing in this which of itself would justify a dissent. The majority opinion gives the view which the Court has taken. It has been thought that the opposing view should be presented.

The majority opinion starts with the proposition that [fol. 65] tangible property is taxable where it is unless there is in the fact situation something which takes it out of this rule. Then follows the fact finding that the case before us presents no such exempting feature. Confronting this is the other view of the fiction of the law that personal property is wherever its owner is and is in the place of his domicile. It is in consequence only there taxable

unless there is that in the fact situation which gives it a situs of its own independent of the domicile of its owner. This fiction is followed in the case of intangibles, but in the case of tangibles may be overthrown by conflicting facts. The question is one of cold blooded law. Whatever element of sentiment there might be in the case is submerged in the fact that the question is really between two States, and whether the tax is payable to Pennsylvania or New York, with the circumstance present that the Pennsylvania tax exaction is the greater. If the situation were reversed and this property was in New York but belonging to the estate of a decedent whose estate was being administered in Pennsylvania, we may assume the taxpayer would not be objecting to a taxation in New York.

The evidentiary facts are not in controversy. They are found in the Answer, supplemented by the undenied averments of the Bill, and have been so stipulated. The pertinent facts are few.

A collection of portraits belonged to a citizen of New York and were physically there. They had great historical, and we have no doubt, artistic value. The owner had at the time no use for them for display purposes or other- [fol. 66] wise, and would have put them in storage. The Art Museum of Philadelphia, learning of this, requested a loan of the collection in order that they might be hung in their galleries for public exhibition. The owner had gathered the collection for his own gratification as an art lover or as a collector. The portraits were not held for sale. He acceded to the request made of him. In this he had no selfish motive, but incidentally he did profit by saving storage, insurance and other charges, and by whatever element of value there was in the publicity given to his collection in case he should ever wish to sell it. The collection thus went to Philadelphia. After being on exhibition at the Art Museum for some time, the owner asked for its return. The Managers of the Art Museum thought highly of the collection and indulged the hope that they might find a friend and patron who would buy it to present to the Museum. They in consequence appealed to the owner, with the request that he permit the portraits to remain with the Museum and put a price upon them for sale to any one who would present them to the Museum. In so doing the owner was not actuated wholly by a commercial motive,

but he took a pride in his collection, which was gratified by the thought of its being kept intact and put on public exhibition. No time limit was mentioned but the owner was at liberty to have the portraits returned to him whenever he chose. The hopes of the Museum Managers were not realized, and the owner died with the portraits still on exhibition.

Out of this has arisen the conflicting claims of Pennsylvania and New York to the right to impose an inheritance [fol. 67] tax. The distinction of when tangible property is taxable in the jurisdiction in which it is, and when it is assumed to be in the domicile of its owner, is illustrated by the not uncommon practice of an owner of such property having residences in different places. A man may have a town and country residence and summer and winter ones, with tangible personal property in each. If they are in different States, the question, in case of his death, arises of what property is taxable in each. Along with this there may be a question of the domicile of the owner. The latter question may throw some light on the former but the two are distinct and different.

The case of Frick vs. Pa., 268 U. S., 473, and others give us the rule for our guidance, but it is not always easy to apply it. It is especially difficult to find a phrase by which the rule may be expressed. The majority opinion employs a happy phrase which comes as near to its expression as any which has been coined, but which yet does not fully express it. The phrase applied to the duration of time the property has been where it is and the expectation of its continuance is "indefinitely prolonged". The fact situation must have this element but yet this is not wholly controlling. There are two expressions in the vernacular which convey the idea. We speak of a place in which a person or thing "belongs" or that a person or things has its "proper place". Wherever a tangible thing "belongs" or has its "proper place", there it is taxable. The truth seems to be that that rule is based upon an idea which is not difficult to grasp but which cannot be verbally defined. [fol. 68] There are many such ideas. The practical consequence is that the question of where property is taxable turns upon an ultimate fact finding to be made in each case presented. In this case the fact finding made is that these portraits at the time of the owner's death, were in Penn-

sylvania and here under circumstances which would not justify the finding that they were not to stay here because they were here with no end of their stay in sight. In other words, their stay was to be "indefinitely prolonged".

We could join in this finding except for one circumstance. The portraits were sent here only for exhibition purposes. Such a stay is transient. We do not see that the character thus given to their stay here was changed by the hope that some one might buy them for presentation to the Museum. The hope remained a hope and was never realized. More than this the law has its policies as well as its principles. There are works of art which it is a liberal education to view. Pilgrimages are made as to a shrine by unnumbered thousands to where they are. Many more thousands are unable to do this. Works of art are, because of this, taken to where the viewers are, that they may see them. This may be to Expositions, such as the Centennial or the Century of Progress. They likewise are put on view in permanent art exhibitions, such as the Academy of Fine Arts or the Art Museum in Philadelphia, the Metropolitan in New York, the Corcoran Art Gallery in Washington and countless other art displays. If the loan of them for such display is meant to be for a limited time, no one would say that they were thus subjected to taxation at the place where on [fol. 69] display, merely because of the accidental circumstance that the owner had died while they were still there. The question of liability to tax arises when the display is "indefinitely prolonged". This exhibition of famous works of art serves a useful public purpose so that the law should not discourage the practice of making such loans. We may be sure that the policy of the law is not to discourage the practice. This means that in making the fact finding of whether works of art thus on exhibition had so far a permanent habitat as to be taxable, the Courts should not be over eager to make that finding. We cannot escape the feeling that it is an ungracious act on the part of any State to tax the owner of art treasures who has sent them into the State to be exhibited for the gratification and education of the people of the State. Merely because their stay there has been prolonged is no justification for taxing them, especially when, as here, the stay has been prolonged because the owner was urged to permit them to remain on exhibition.

As it has been determined that this Bill may be maintained, we think that on its merits its prayers should be granted and the injunction prayed for issue.

[fol. 70] In United States District Court for the Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor Under the Will of Thomas B. Clarke, Deceased, Complainant,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Respondents

Final Decree—Filed April 5, 1934

And now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

I. That the Bill of Complaint be, and is hereby dismissed.

By the Court.

(S.) O. B. Dickinson, Judge.

[fol. 71] In United States District Court

[Title omitted]

Petition for Appeal—Filed April 5, 1934

The above-named complainant, feeling aggrieved by the decree made and entered in the above entitled proceeding in equity on the 5th day of April, A. D. 1934, does hereby appeal from the said decree to the Supreme Court of the

United States, for the reasons specified in the Assignments of Error filed herewith; and prays that this appeal may be allowed, and that a transcript of the record proceedings and papers, upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States under the rules of the said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated April 5, 1934.

Leslie M. Swope, Henry S. Drinker, Jr., Attorneys for Appellant.

[fol. 72] In United States District Court, Eastern District of Pennsylvania, September Term, 1932

In Equity. No. 7395

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Complainant,

vs.

The Honorable William A. Schnader, Attorney General of the Commonwealth of Pennsylvania and the Honorable Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, Respondents

Order Allowing Appeal—Filed April 5, 1934

And now, to-wit, April 5th, 1934, the foregoing appeal to the Supreme Court of the United States is allowed upon the giving by the above-mentioned complainant of a bond, as required by the law, in the sum of two hundred fifty dollars.

(S.) O. B. Dickinson, Judge.

[fol. 73] In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed April 5, 1934

And now, to-wit, April 5, 1934, comes the complainant in the above-entitled proceeding in equity, appellant herein,

and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the decree made by this Honorable Court on the 5th day of April, 1934, in the above-entitled case.

I

That the United States District Court for the Eastern District of Pennsylvania erred in denying the injunction prayed for by the complainant.

II

That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint on the merits.

[fol. 74]

III

That the United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceedings in equity upon the complainant.

IV

That the United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

"And now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

"I. That the Bill of Complaint be, and is hereby dismissed."

V

That the United States District Court for the Eastern District of Pennsylvania erred in making the following finding:

"(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that state at that time."

VI

That the United States District Court for the Eastern District of Pennsylvania erred in making the following [fols. 75–77] conclusion of law:

"The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed."

Wherefore, the appellant prays that the aforesaid decree be reversed and that a decree be entered in accordance with the prayer of the complainant set forth in its Bill of Complaint and for such further relief and in such form as the Supreme Court of the United States shall deem just.

Leslie M. Swope, Henry S. Drinker, Jr., Attorneys for Appellant, 1429 Walnut Street, Philadelphia, Pa.

[fol. 78] In United States District Court

[Title omitted]

Stipulation re Transcript of Record—Filed April 18, 1934

It is hereby agreed and stipulated, in lieu of præcipes, that the following portions of the record of said District Court in the above matter are to be included in the transcript:

Docket entries.
Bill of Complaint.
"Exhibit A" (Will of Thomas B. Clarke and codicils).
Injunction Affidavit of Charles C. Jordan.
Injunction Affidavit of Fiske Kimball.
Motion for Interlocutory Injunction.
Restraining Order.
Bond sur restraining order.
Answer.
Stipulation as to certain facts.
Opinion of the Court, Kirkpatrick, J., sur pleading and proofs filed March 24, 1933.
Decree—filed April 11, 1933.
Opinion Supreme Court reversing and remanding.

Opinion District Court on rehearing.
Final Decree.
[fol. 79] Petition for appeal.
Order allowing appeal.
Assignment of Errors and Prayer for Reversal.
Statement as to Jurisdiction of Appeal.
Notice as to opposing Statement of Jurisdiction.
Waiver of Jurisdiction by appellees.
Citation and Acceptance of Service thereof.
Bond sur appeal.
Proof of service of papers pursuant to Rule 12.
Stipulation re transcript of record.
Clerk's certificate.

Leslie M. Swope, Attorney for Appellant, of Counsel.
Harris C. Arnold, Deputy Attorney General, Attorney for Appellees, of Counsel.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] In Supreme Court of the United States

Statement of Points to be Relied Upon and Stipulation as to Printing Record—Filed May 4, 1934

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

I. That the United States District Court for the Eastern District of Pennsylvania erred in denying the injunction prayed for by the complainant.

II. That the United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint on the merits.

III. That the United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceedings in equity upon the plaintiff.

[fols. 82 & 83] IV. That the United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

"And now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:

"I. That the Bill of Complaint be, and is hereby dismissed."

V. That the United States District Court for the Eastern District of Pennsylvania erred in making the following finding of fact:

"(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that state at that time."

VI. That the United States District Court for the Eastern District of Pennsylvania erred in making the following conclusion of law:

"The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed."

Henry S. Drinker, Leslie M. Swope, Attorneys for Appellant, 1429 Walnut Street, Philadelphia, Penna.

Service accepted April 10, 1934. Harris C. Arnold, Deputy Attorney General, of Counsel for Appellees.

[fol. 84] STIPULATION RE DESIGNATION OF THE PARTS OF RECORD TO BE PRINTED

Comes now the appellant and the appellees by their undersigned counsel and stipulate that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	Record page
Docket Entries	1
Bill of Complaint	3
"Exhibit A" (Will of Thomas B. Clarke and codicils)	13
Injunction Affidavit of Charles C. Jordan	21
Injunction Affidavit of Fiske Kimball	28

Motion for Interlocutory Injunction 31
Restraining Order 32
Answer 37
[fols. 85 & 86] Stipulation as to certain facts 43
Opinion of the Court, Kirkpatrick, J., sur pleading and proofs filed March 24, 1933 44
Decree—filed April 11, 1933 49
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Waiver of Jurisdiction by appellees " "
Proof of service of papers pursuant to Rule 12 ..... " "
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This Stipulation designating parts of record to be printed.
Statement of points to be relied upon, filed herewith.

Leslie M. Swope, Attorney for Appellant, of Counsel. Harris C. Arnold, Deputy Attorney General, Attorney for Appellees, of Counsel.

May 3, 1934.

[fol. 87] [File endorsement omitted.]

Endorsed on cover: File No. 38,623. E. Pennsylvania, D. C. U. S. Term No. 30. City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Appellant, vs. William A. Schnader, Attorney General of the Commonwealth of Pennsylvania and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania. Filed May 4, 1934. File No. 30, O. T., 1933.

No. [redacted] 38

CITY BANK FARMERS TRUST COMPANY, Executor Under the Will of THOMAS B. CLARKE, Deceased,

Appellant,

vs.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

[redacted]

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEPTEMBER TERM, 1932.

In Equity. No. 7395.

CITY BANK FARMERS TRUST COMPANY, EXECUTOR UNDER THE WILL OF THOMAS B. CLARKE, DECEASED,
Complainant,

vs.

THE HONORABLE WILLIAM A. SCHNADER, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA AND THE HONORABLE LEON D. METZGER, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA.

Respondents.

STATEMENT AS TO JURISDICTION OF APPEAL.

(Filed Apr. 5, 1934.)

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

Section 266 of the Judicial Code as last amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 938 (U. S. Code, Title 28, Sec. 380) relating to applications for an "interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute" etc., provides that:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

Statute of the State, the Validity of Which is Involved.

> "Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, of the State of Pennsylvania, provides in part as follows:
>
> "SECTION 1. Be it enacted, etc., That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:
>
> * * * * * * *

"(*b*) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

C.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 5th day of April, 1934.

The application for appeal was presented on the 5th day of April, 1934.

D.

Nature of Case and Ruling Below.

A New York resident, having made an accommodation loan of a collection of rare paintings to a Pennsylvania Museum for free exhibition to the public under an agreement that the same should be returned upon demand, and having died while the pictures were there on exhibition, the Secretary of Revenue and the Attorney General of Pennsylvania are proceeding to appraise, assess and collect an inheritance tax thereon under the alleged authority of the Pennsylvania Inheritance Tax statute. The executor, a New York Trust Company, applied for an interlocutory, and thereafter a final, injunction on the ground that the Pennsylvania statute, if it imposes such a tax, is unconstitutional, and if it does not, the acts of defendants are unconstitutional. The bill was framed so as to determine whether Pennsylvania or New York had the right to an

inheritance tax, it having been decided by recent decisions of this Court that only one State can impose an inheritance tax upon the transfer by death of specific property. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *First Natl. Bank of Boston* v. *Maine,* 284 U. S. 312; *Frick* v. *Pennsylvania,* 288 U. S. 473. The Tax Commission of the State of New York filed briefs as *amici curiæ* in all of the several hearings had.

Upon the first hearing before the District Court, sitting as a court of three judges pursuant to the provisions of Section 266 of the Judicial Code, the bill was dismissed on the ground that complainants had an adequate remedy at law. An appeal was taken to this Court, which reversed (54 S. Ct. 259) the lower court and remanded the cause with instructions to reinstate the bill and proceed to a hearing upon the merits. Thereupon, a final hearing was had upon the merits in the District Court and the bill dismissed by a divided court. This appeal is taken from said decree of dismissal.

The facts of the case were not in dispute, being as alleged in the pleadings and in a supplemental stipulation. The majority of the court held that, under the decisions of this Court, the pictures had an actual situs in Pennsylvania for inheritance tax purposes. The minority held that, under the decisions of this Court, the pictures had their tax situs in New York. The division of the court resulted from a difference of opinion as to what constitutes "actual situs" under the decisions of this Court; as to whether chattels are presumptively taxable at the domicile of the owner or at the place where the property happens to be at death; as to the legal importance of the time element involved in the length of the loan; and as to the legal effect of the pur-

pose of sending the pictures to Pennsylvania and of the agreement of the owner and Museum as to the return thereof. The minority opinion pointed out that this "is what is called a 'close case.' "

The important and as yet unsettled questions of law to be determined by this Court in the present appeal are:

(1) The respective rights of the several States to collect inheritance tax on chattels owned by a resident of one State but resting in another State at the moment of the owner's death.

(2) What constitutes the "actual situs" of chattels as that phrase is used by this Court in *Frick* v. *Commonwealth*, 268 U. S. 473, when applied to a temporary sojourn of chattels in a State other than that of the owner's domicile.

(3) Whether such "actual situs" is determined solely on the basis of length of stay or also upon the intent and purpose of the stay and similar elements.

(4) Whether, in determining the legal situs for inheritance tax of chattels, there shall be applied (as suggested by this Court in *New York Central Railroad* v. *Miller*, 202 U. S. 584, 597) the established rules of law for determining domicile; or, as held by the majority of the lower court, a new set of legal principles are to be evolved; and if so, what?

The importance of such questions to Pennsylvania, New York and the several States generally, as well as to the owners of works of art disposed to loan them for exhibition in other States and to the public, is apparent.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Clark v. *Poor,* 274 U. S. 554, 556;
Louis K. Liggett Company v. *Baldridge,* 278 U. S. 105;
Moore v. *Fidelity & Deposit Co.,* 272 U. S. 317, 320-321;
Smith v. *Wilson,* 273 U. S. 388.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 266 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

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LESLIE M. SWOPE,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 30.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, Appellant,

v.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPT. TERM, 1932, NO. 7395, OPINION MARCH 29, 1934 (R. 50).

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The essential facts, as averred in the Bill (R. 3-13) and in the Answer (R. 34-41) and in the Stipulation (R. 41-42) are as follows:

In March, 1928, Thomas B. Clarke, a citizen and resident of New York City, then in his 80th year, at the request of his intimate friend Dr. Fiske Kimball, Director of the Pennsylvania Museum, loaned to the Museum, for exhibition at the formal opening of the newly constructed Museum building on the Philadelphia Parkway, his unique collection of early American portraits.

The arrangement between Clarke and Kimball was wholly oral. No consideration was paid or intended to be paid to Clarke for the loan. It was understood that the pictures would be returned to Clarke at any time on his request.

On several occasions subsequent to the date of the original loan in March, 1928, Clarke suggested the return of the paintings, but under pressure from Kimball to extend his loan because of the great appreciation shown by the public, Clarke orally consented from time to time to leave the paintings temporarily at the Museum and thus when Clarke died on January 18, 1931, they were there on display, returnable on demand.

The 164 paintings comprising the loan had been collected by Clarke over a period of twenty or thirty years. 85 of them were owned by a New York corporation, The Art House, Inc., of which Clarke was the sole stockholder. Of the remaining 79 owned by Clarke personally, 5 were at the time of the loan in his New York residence, 10 were on exhibition at the Century Club in New York, and the balance, 64,

were in storage in New York City. All of the 79 owned by Clarke personally, which at the time of the loan had an unquestioned situs in New York City, had from time to time been exhibited there, in each case with selected groups of the 85 belonging to The Art House, Inc., but not as a unit or in connection with the entire 85.

In the spring of 1929, after the pictures had been at the Museum for about a year, Clarke, at Kimball's solicitation, wrote Kimball that if Kimball could secure a donor who would present the entire collection of 164 paintings to the Museum, Clarke would sell them as a whole to such donor at a stated price, it being then understood that Clarke would allow them to remain at the Museum for such reasonable time as Kimball might require to secure such donor. Subsequently, on May 21, 1930, Clarke again wrote Kimball stating that the above arrangement would terminate on June 17, 1930. From the latter date, at Kimball's solicitation, the pictures were permitted by Clarke to remain at the Museum, but with the understanding that they would be returned to Clarke in New York at any time on his request. During this time, Mr. Clarke, although not obligated to sell or otherwise to dispose of them, was willing (as the Answer avers) to sell the collection as a whole to any purchaser who would buy it for presentation to the Pennsylvania Museum or to a substantially similar institution.

When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space in

a New York warehouse where sixty-four of the pictures were at that time (R. 35). Thereafter, Clarke paid no rentals for storage space or any other storage charges on account of these pictures, nor did he reserve or control any storage space adequate for the storage of the pictures in New York from March, 1928, until the time of his death on January 18, 1931. Such storage space was, however, always readily obtainable during the entire period of the loan.

While the paintings thus remained at the Museum, Clarke made no definite plans or request for their return or removal to any other place, except that on April 29, 1929, four of them were sent at his request to the Virginia Historical Society, for an exhibition at Richmond, which four were returned to the Philadelphia Museum on May 25, 1929.

The Museum is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania and has secured a substantial portion of the works of art therein displayed to the public by voluntary loans from non-resident philanthropists, none of which were intended or regarded as permanent loans to the Museum. It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans.

Mr. Clarke's will was admitted to probate by the Surrogate Court of New York County, New York. It is not disputed that the paintings in question passed under his will as part of his residuary estate.

Following Clarke's death the controversy arose as to the power of the State of Pennsylvania to impose an inheritance tax on the 79 paintings belonging to the Estate of Mr. Clarke, the question being as to which of the two states, Pennsylvania or New York, was entitled to the tax. After some attempt by the Pennsylvania authorities to work out a reciprocity agreement with New York, complainant paid (under protest) the New York Estate Tax amounting to $69,500, on the basis of a return which included the paintings in question, and Mr. Schnader having advised, as Attorney General of Pennsylvania, that complainant's claim of non-taxability in Pennsylvania would be denied, complainant brought the present bill.

At the prior hearing, the District Court dismissed the bill on the ground that complainant had an adequate remedy at law. On appeal this Court reversed the judgment and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits.

Thereupon, a final hearing was had upon the merits in the District Court and the bill dismissed by a divided Court. This appeal is taken from said decree of dismissal.

SPECIFICATION OF ERRORS.

I. The United States District Court for the Eastern District of Pennsylvania erred in denying the injunction prayed for by the complainant.

II. The United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint on the merits.

III. The United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceedings in equity upon the plaintiff.

IV. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

> "And Now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:
>
> "I. That the Bill of Complaint be, and is hereby dismissed."

V. The United States District Court for the Eastern District of Pennsylvania erred in making the following finding, which, although designated a finding of fact, was in reality a conclusion from admitted facts, based on an erroneous understanding of the law:

> "(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that State at that time."

VI. The United States District Court for the Eastern District of Pennsylvania erred in making the following conclusion of law:

> "The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed."

SUMMARY OF ARGUMENT.

I. The transmission from the dead to the living of a particular thing is an event which can take place in and be made the basis of inheritance tax by but one state. The Constitution precludes the imposition of inheritance tax on these paintings by both New York and Pennsylvania.

II. The Pennsylvania tax here involved is a tax not on property but on succession by will or intestacy.

III. The personal property of Mr. Clarke, including the paintings in question, passed to the legatees named in his Will by virtue of the laws of New York and not of Pennsylvania.

Although the devolution of a decedent's real estate is governed by the law of the situs, in the case of personalty the law of the decedent's domicile is controlling.

IV. Under the decisions of this Court the situs of Mr. Clarke's paintings, for inheritance taxation, was New York and not Pennsylvania.

The recent decisions of this Court have progressively restricted the power of a State other than that of the decedent's domicile to impose inheritance tax on his personal estate.

Under all the tests suggested,—the permanent location in another state, the keeping and using of the property, or its habitual employment there,—the paintings here involved were subject to inheritance tax only by New York. Under the admitted allegations in the Bill, the loan to the Museum in Pennsylvania was but "temporary." The loan was successively renewed "on several occasions," each renewal starting the loan afresh. During the sojourn in Pennsylvania, the paintings were neither "kept" nor "used" by their owner, but by the Museum, for the benefit of the citizens of Pennsylvania. There was no employment at all of the paintings by their owner in Pennsylvania, much less a "habitual employment," nor did Pennsylvania occupy any "real taxable relationship" toward him or his estate.

Assuming that personalty may acquire a situs other than that of its owner, the test as to the acquisition of such new situs should be that established by the decisions as to the change of domicile of an individual, requiring not only removal to the new situs but also an intention that the new location be permanent. Such an intention cannot be predicated on a loan made for a special occasion and renewed "from time to time" "on several occasions," at the repeated solicitation of the borrower.

There is no suggestion in this case of a purpose or determination on Mr. Clarke's part that his paintings should remain permanently in Pennsylvania. Any such purpose is expressly negatived by the repeated requests for the renewal of the loan and by his failure to bequeath them to the Museum. His offer to sell them was not initiated by him but by the borrower, and came to nothing. The present proceedings are but a sorry recognition of his generosity to the people of Pennsylvania.

ARGUMENT.

I. The Transmission from the Dead to the Living of a Particular Thing is an Event which can Take Place in and be Made the Basis of Inheritance Tax by but one State. The Constitution Precludes the Imposition of Inheritance Tax on these Paintings by both New York and Pennsylvania.

Whatever may have been the law prior thereto, this Court, by its recent decisions has settled the constitutional principle under which but one State may impose inheritance taxes on the transmission, by a given decedent, of a specific item of property:

Frick v. *Pennsylvania, 268 U. S. 473;*
Farmers Loan & Trust Co. v. *Minnesota, 280 U. S. 204;*
First Nat'l Bank of Boston v. *Maine, 284 U. S. 312.*

In the case last cited the Court held that Maine could not constitutionally impose an inheritance tax

upon the estate of a Massachusetts decedent with reference to shares of stock in Maine corporations owned by the testator at the time of his death. In the course of its opinion the Court said (p. 326):

> "The rule of *immunity from taxation by more than one state,* deducible from the decisions in respect of these various and distinct kinds of property, *is broader than the applications thus far made of it.* In its application to death taxes, the rule rests for its justification upon the *fundamental conception* that *the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time.* In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment,

within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which taxes place, and in the nature of things can take place, in one of the states only.

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." (Italics ours.)

In the recent decision in *Burnet* v. *Brooks,* 288 U. S. 378, holding that the principle "thus progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government" (p. 403) in reference to locally held securities of a non-resident alien, the Court stated that these decisions "established that proper regard for the relation of the States in our system required that the property under consideration (personalty) should be taxed in only one State and that jurisdiction to tax was restricted accordingly" (p. 401).

II. The Pennsylvania Tax here Involved is a Tax not on Property but on Succession by Will or Intestacy.

Much of the confusion of thought in cases of this kind arises, it is believed, from a failure to recog-

nize the distinction, so clearly pointed out by this Court in *Eidman* v. *Martinez,* 184 U. S. 578, 589, between taxes on property and those on the transfer of property at death, by will or intestacy—

> "The tax in question in this case not being upon the property itself, but upon the succession * * *, laws imposing general taxes upon real and personal property are not controlling when applied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. *The actual situs of the property in such cases cuts but a small figure,* while in the case of general taxes upon such property it is now considered determinative of the whole question." (Italics ours.)

That the majority of the Court below in the case at bar thus failed to recognize this difference between property taxes and inheritance taxes is apparent from the following passage in the opinion (Rec. 53):

> "The portraits were safely housed in Pennsylvania and were under the protection of the laws of that State. They had been taken out of storage to be placed where they were. They were there for an indefinitely prolonged stay and that, we think, gives them an actual situs."

The transfer which is taxed is an event "single in character" which takes place at a single moment of time. Hence the legal and factual status at the moment of death must be the basis for liability for tax. At the moment of Mr. Clarke's death the paintings were on temporary loan subject to be returned

on demand. Neither the length of time they had been in Pennsylvania nor the fact that they had been receiving protection have any bearing on the legal status at the moment of death. The facts in the above quoted statement from the opinion below might be important if the tax in question were a property tax but relate in no way to the privilege of transmission which is the thing taxed under the Pennsylvania law.

By the express terms of Section 1 of the Pennsylvania Act of June 20, 1919, P. L. 521 (72 P. S. §2301, quoted on p. 6 of the Record) the tax is imposed "upon the *transfer* of any property * * * when the transfer is by will or intestate laws." As the Supreme Court of Pennsylvania said in *Kirkpatrick's Estate,* 275 Pa. 271, 273:

> "* * * it is clear that the Act of 1919 did not impose a tax on property, but requires payment to be made from the estate of a decedent for the right of succession or the privilege of receiving at death the property possessed by a decedent. This right or privilege is purely a creature of statutory law. It did not exist at common law, and individuals possess no natural right to such succession; the sovereign authority that gives it may demand payment for the gift: Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, 290. 'The public contribution which death-duties exact is predicated on the passing of the property as the result of death as distinguished from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy.' "

In this respect the Pennsylvania statute is not unlike other inheritance tax laws, including that of New York.

Knowlton v. *Moore,* 178 U. S. 41;
U. S. v. *Perkins,* 163 U. S. 625;
Magoun v. *Illinois Tr. & Savings Bank,* 170 U. S. 283;
Keith v. *Johnson,* 271 U. S. 1;
Matter of White, 208 N. Y. 64, 67.

III. The Personal Property of Mr. Clarke, Including the Paintings in Question, Passed to the Legatees Named in his Will by Virtue of the Laws of New York and not of Pennsylvania.

"A transfer from the dead to the living * * * is effected under the laws, and occurs within the limits, of a particular State. * * * Death duties rest upon the power of the State imposing them to control the privilege of succession." To enable a State to impose such a tax there must be on the part of the State a "real taxable relationship to the event which is the subject of the tax."

First National Bank of Boston v. *Maine,* 284 U. S. 312, 327, 329.

Pennsylvania had no taxable relationship to the transfers made by the Clarke will. These transfers did not depend for their validity upon the law of Pennsylvania nor had Pennsylvania the right to control the privilege of succession in respect to such personal property belonging to Mr. Clarke.

The will was admitted to probate in New York, the State of Mr. Clarke's domicile. It derived all its authenticity as a will and all its capacity to transmit property, from the judicial proceeding in New York. Pennsylvania added nothing to the validity of the will or probate. Section 24 of the Wills Act of Pennsylvania, Act of June 7, 1917, P. L. 403, 412 (20 P. S. 281), provides as follows:

> "Nothing in this act contained shall be construed to apply to the disposition of personal estate by a testator whose domicile at the time of his death was out of this Commonwealth."

See also *Beaumont's Estate,* 216 Pa. 350, 354.

The validity of all dispositions made by the will of personal property, tangible or intangible, is governed by the law of New York, the domicile. "That law is part of the disposition and the foundation of all title under it." (*Dammert* v. *Osborn*, 140 N. Y. 30, 39.)

> "According to the uniform course of the decisions of this court, the validity of these devises, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testatrix had her domicile. *Vidal* v. *Girard,* 2 How. 127; *Wheeler* v. *Smith,* 9 id. 55; *McDonogh* v. *Murdock,* 15 id. 367; *Fontain* v. *Ravenel,* 17 id. 369, 384, 394; *Perin* v. *Carey,* 24 id. 465; *Lorings* v. *Marsh,* 6 Wall. 337; *United States* v. *Fox,* 94 U. S. 315; *Kain* v. *Gibboney,* 101 id. 362; *Russell* v. *Allen, ante,* p. 163."
>
> *Jones* v. *Habersham,* 107 U. S. 174, 179.

Section 328 of the American Law Institute's Restatement of Conflict of Laws, with the pertinent comments, is as follows:

> "SECTION 328. The validity and effect of a will of movables are determined by the law of the state in which the deceased died domiciled."
>
> "*Comment:*
>
> (*a*) The law of the state of the domicil of a testator determines his capacity to make a will, the form of the will, the validity of a particular provision in the will, the nature of the estate created, and the capacity of a legatee to take his legacy. In case of a legacy to a corporation, the state of domicil of the deceased determines its capacity to take the legacy in accordance with the law of the state of incorporation."
>
> * * * * * * *
>
> "(*d*) In case a will disposes of both land and movables, the validity of devises of land is governed by the law of the state of situs of the land devised; the validity of bequests of movables is governed by the law of the state in which the testator died domiciled."

In *Eidman* v. *Martinez,* above cited, the question was whether the corporate bonds of a Spanish decedent, held by a New York agent, were subject to the Federal inheritance tax act of 1898 imposed upon the transfer of "property, either by will or by the intestate laws of any State or Territory." This Court held that the property passed by the law of Spain rather than by the law of New York and therefore did not pass, according to the terms of the statute, under the laws "of any state or territory." The

argument was urged upon this Court that the property actually passed under the laws of New York which adopted by comity as its own law, the succession laws of Spain. This Court answered that argument as follows (184 U. S. p. 591-2):

> "To say that we recognize by comity the law of a foreign domicil as controlling the transmission or succession of personal property because it thereby becomes *our* law, (and the property therefore taxable,) as is indicated in some cases, notably in *Alvany* v. *Powell,* 2 Jones Eq. 51, is misleading and little more than a play upon words. When we speak of *our* laws we mean to be understood as referring to our own statutory laws or the common law we inherited from the mother country, and when we apply the laws of a foreign domicil we do so, not because they are our laws, but because upon principles of comity we recognize those laws as applicable to the particular case. But to speak of such foreign laws as thereby becoming 'the intestate laws of any State or Territory,' wherein they are enforced, is practically to confound the whole distinction between the law of the *situs* and the law of the domicil. We do not enforce the law of Spain in this case because it is our law, but because the practice of all civilized nations is to recognize the law of the domicil as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow, if estates, situated possibly in half a dozen countries, were administered and distributed according to the laws of each country in which any portion of such estate happened

> to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country."

Pennsylvania's relation to the transfer of Mr. Clarke's personal property under his will was entirely passive. Ancillary administration was not actually raised in Pennsylvania and, even if it could have been insisted upon for the benefit of local creditors, was no more than could be required had the property in question remained in Pennsylvania for but a single day, or had the *res* been stock of a Pennsylvania corporation, which under the decisions would clearly have not been subject to inheritance tax, in spite of the fact that in the case of stock something would have to be done in Pennsylvania, subject to Pennsylvania law, to complete the transfer.

> *First National Bank of Boston* v. *Maine,* 284 U. S. 312.

The devolution by will or by intestacy of real property has, on the contrary, always been governed not by the law of the owner's domicile, but by that of the situs of the property. The State, being vitally interested, as a matter of essential public policy, in the personnel of the owners of its soil, has consistently refused to recognize any law other than its own as governing the right to transmit real property, and this Court has recognized this in sustaining the

right of the State of the situs of realty to impose inheritance tax on the real estate of a foreign decedent and in denying that right to the State of the owner's domicile.

IV. Under the Decisions of this Court the Situs of Mr. Clarke's Paintings, for Inheritance Taxation, was New York and not Pennsylvania.

Admittedly, Mr. Clarke's residence and domicile, at the time of his death and for years prior thereto, was New York. Admittedly, also, the situs or domicile of the paintings, prior to their loan to the Pennsylvania Museum, was New York and had been for the twenty or thirty years during which Mr. Clarke had collected them.

While none of the prior decisions of this Court is precisely on all fours with the facts here presented, the principles enunciated in them fully support, it is submitted, the position of appellant,—that the seventy-nine paintings temporarily loaned by Clarke to the Pennsylvania Museum had, at his death, no legal situs in Pennsylvania sufficient to warrant the exaction by Pennsylvania of an inheritance tax on their transfer from a New York decedent to his New York legatees.

We will first consider the three recent decisions cited under our First Point (*supra,* p. 9).

Frick v. *Pennsylvania, 268 U. S. 473,* presented a case converse to that at bar. There Frick, a resi-

dent of Pennsylvania, had a collection of rare paintings and works of art permanently housed in a building in New York City especially constructed for that purpose and known as "The Frick Collection." He also had certain paintings, objects of art, furniture, etc., at his summer home in Massachusetts. Pennsylvania claimed a right to impose an inheritance tax upon these items of tangible personal property, but the Court held that such a tax could not be imposed under the Fourteenth Amendment because the property had an "actual situs" in New York and in Massachusetts respectively, saying (p. 496):

> "* * * that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an *actual situs* in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." (Italics ours.)

The decision clearly pointed out that an inheritance tax on such items could be imposed only by the State where they had an actual situs. The Court did not, however, there define what it meant by "actual situs" because the situation was clear in that respect. The Frick property held taxable outside of Pennsylvania consisted of the Frick Collection of paintings, housed permanently in a special building in New York City and bequeathed by Frick to New York, and of furniture in his New York residence and in his summer home in Massachusetts, in each case a part of his permanent establishments in those localities. New

York was the permanent address of the Frick Collection, as well as of his furnished New York residence. Massachusetts was the permanent address of his furnished summer home at Pride's Crossing, as well as of the furniture necessary to make it a home.

> "This property," the Court said, "by reason of its character and situs, was wholly under the jurisdiction of those States, and in no way under the jurisdiction of Pennsylvania. * * * In these respects the situation was the same as if the property had been immovable realty" (p. 492).

In each case the personalty was an essential part of the establishment, which, like real estate, was beyond the taxing power of Pennsylvania.

New York and Massachusetts were, furthermore, the respective States where, in the language of the later Maine case, the property was *"kept and used."*

In *Farmers Loan & Trust Company* v. *Minnesota, 280 U. S. 204,* this Court, expressly overruling *Blackstone* v. *Miller, 188 U. S. 189,* held that bonds were subject to inheritance tax only by the State of the domicile. Referring to the Frick case which sanctioned the taxation by States other than Pennsylvania of Frick's stock in foreign corporations, the Court said (p. 210):

> "At this time it cannot be assumed that tangible chattels *permanently* located within another State may be treated as part of the universal succession

> and taken into account when estimating the succession tax laid at the decedent's domicile." (Italics ours.)

By the above-quoted statement the Court made it clear that tangible chattels can in no event have a situs for taxation in a State other than that of the decedent's domicile unless they are "permanently located" in such new State.

It is believed that this is also the proper construction of the Pennsylvania inheritance tax statute (Act of June 20, 1919, P. L. 521; 72 P. S. sec. 2301) which imposes a tax upon the transfer of any property, real or personal, owned by a non-resident decedent:

> "(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, * * *."

While the statute literally imposes an inheritance tax upon a non-resident's chattels "within this Commonwealth," this language must be read in connection with the later Act of May 2, 1929, P. L. 1258 (72 P. S. sec. 2306), creating a reciprocal exemption from inheritance taxation on all personal property of non-residents "except tangible personal property having an *actual situs* in this Commonwealth." The Legislature of Pennsylvania thus construed the phrase "within this Commonwealth" in the original statute to mean having a taxable situs therein as defined by the decisions of this Court. This would seem to follow from the following statement of the Supreme

Court of Pennsylvania in *Commonwealth* v. *Clyde Steamship Co., 268 Pa. 278, 281:*

> "It is hardly necessary to say that the taxable situs of tangible personal property, not *permanently* nor *continuously* nor *habitually* but only *temporarily* in a state is the domicile of the owner." (Italics ours.)

In *First National Bank* v. *Maine, 284 U. S. 312,* heretofore referred to, the Court, in discussing the relative merits of two contending states to impose inheritance tax on a specific item of personal property, lays down as the test of actual situs the place where the property is *"kept and used"* (page 329):

> "This ancient maxim (*mobilia sequuntur personam*) had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded *to the law of the place where the property is kept and used."** (Italics ours.)

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* An interesting although of course not here authoritative application of this idea, with especial reference to the accommodation loan feature of the case at bar, is found in *Com.* v. *Union Pac. R. Co.,* 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091. There the Railroad, a non-resident, permitted its freight cars to be used by local railroads at a nominal per diem rental (which

And in the next paragraph the Court links up the right to tax with a *"real taxable relationship"* to the power of the state to control the privilege of succession (p. 329):

> "And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, *any real taxable relationship to the event which is the subject of the tax.*" (Italics ours.)

The majority of the lower Court in the case at bar placed considerable reliance on *Blodgett* v. *Silberman, 277 U. S. 1,* where this Court (prior to the decision in First National Bank *v.* Maine) held that $287.48 of coin and bank notes, kept by a Connecticut decedent in a safe deposit box in New York City (where the decedent was active in business as a partner in a brokerage firm), might not be subjected to inheritance tax by Connecticut. It did not there appear that the

allowed no profit) to facilitate through routing of freight. The Court refused to allow the Commonwealth to tax the average number of cars in the state because the owner did not *use* the cars in the state *for profit,* but in effect loaned them temporarily to local lines for the convenience of the latter. "In no just or exact sense," said the Court, "* * * can it be said that the foreign railroads either send, use, or employ any portion of their freight cars in this state. * * * As truly said by Justice Holmes in *N. Y.* v. *Miller,* 202 U. S. 584, these foreign freight cars come into this state on 'random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of *other* roads.' *No business, no purpose of the owning road, is served by their presence here.* * * * We have then only chattels temporarily present within the state, which such chattels this state may not tax." (Italics ours.)

coin and bank notes had ever been in Connecticut or that they were ever to be taken or kept or used by the decedent there. From the fact that they were kept in the safe deposit box in New York, it would appear that they were for use in connection with the decedent's New York business. This Court considered that this cash had been "so definitely fixed and separated in its actual *situs* from the person of the owner" that it belonged permanently in New York, as did the paintings and furniture in the Frick case.

The above case is obviously no authority for the position that pictures, originally located permanently in New York, lost their New York domicile and acquired a taxable situs in Pennsylvania merely by reason of a temporary sojourn in Pennsylvania at the request of the people of Pennsylvania, for mere temporary display and not part of a permanent exhibition.

In *Johnson Oil Ref. Co.* v. *Oklahoma, 290 U. S. 158,* the question was as to the power of Oklahoma to levy a property tax on the entire fleet of oil tank cars owned by an Illinois corporation whose refinery was located in Oklahoma, where, although all the cars were in Oklahoma for part of every year, but a small proportion were there at any time. The Court, reversing the State Court, held that the State could exact the tax only on its "proper share" of the entire fleet, measured by the average number of cars present in Oklahoma at a given time. The Court stated the basis for jurisdiction, even as to property taxes, to be

the *habitual employment* of the property within the State (pp. 161-162):

> "* * * While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description *must be determined on a basis which is consistent with the like jurisdiction of other States.*
>
> "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. * * *" (Italics ours.)

Assuming that, since the decision in the Maine case, tangible personalty not part of an established local business or, as in the Frick case, intimately connected with real estate, can acquire a situs away from the owner's domicile sufficient to support inheritance taxation by the State of the situs, still the Clarke pictures would fall far short either of the test of "the *habitual employment* of the property within the State" in the foreign State, or that of the place where the property was "*kept* and *used.*" Certainly one

who, at the request of the officers of a public museum of a neighboring State, loans his pictures to such museum for a special occasion, and merely allows them to remain, subject to recall at any time, by the exercise of renewed courtesy on repeated applications for an extension of the loan, cannot be said to have "habitually employed" his property within the borrowing State. Nor can they be said to have been "kept and used" by Clarke in Pennsylvania, since the pictures were, during their sojourn to Pennsylvania, kept by the Museum, and used solely by it for the benefit of the citizens of Pennsylvania.

In the *Maine* case the Court had already pointed out (284 U. S. at p. 330) that its decisions, confining the power to levy inheritance taxes to one State on each specific item of property, did not preclude the State of Maine from properly exacting a transfer tax on the transfer of the stock of a Maine corporation though owned by a non-resident, the liability for the tax being based on the transfer of the shares in Maine, irrespective of whether the occasion thereof was the sale or gift by the holder or his death. Similarly, under the above decisions, Pennsylvania might conceivably have exacted an annual property tax on the pictures for the time during which they were physically located in the Pennsylvania Museum, irrespective of the permanency of their situs there, the tax being based on the temporary protection accorded them under Pennsylvania law. In each of

these cases the tax would have a "real taxable relationship to the event which is the subject of the tax." Clearly, however, there is no such relationship incident to the fact that Mr. Clarke happened to die before he got his pictures back home again.

In determining whether or not situs in Pennsylvania was temporary or permanent, reference may be had to some of the earlier decisions dealing with property taxation.

In *Hays* v. *The Pacific Mail Steamship Co., 58 U. S. 596,* the taxpayer, a New York corporation engaged in the shipping business, complained of the assessment and collection of property taxes in California upon its ships that put into California ports. The Court upheld the taxpayer, saying (p. 599):

> "She is within the jurisdiction * * * *temporarily,* and for a purpose wholly excluding the idea of *permanently* abiding in the State, or changing her home port."
>
> * * * * * * *
>
> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but *temporarily,* engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." (Italics ours.)

In *Union Refrig. Transit Company* v. *Kentucky, 199 U. S. 194,* the Court held that a Kentucky corporation could not be subjected to property taxation in Kentucky with reference to refrigerator cars permanently employed without the State. In the course of the opinion the Court uses the word "permanently" ten different times, laying emphasis upon the permanence of the location of the property outside of Kentucky and, distinguishing the case of *Commonwealth* v. *American Dredging Co., 122 Pa. 386,* which it apparently approved, upon this basis (p. 208):

> "In *Commonwealth* v. *American Dredging Company,* 122 Penna. St. 386, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the State. It was said that the non-taxability of tangible personal property located permanently outside of the State was not 'because of the technical principle that the *situs* of personal property is where the domicil of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property *permanently* located in another State. In such cases it is taxable within the jurisdiction where found and is exempt at the domicil of the owner.' *The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation.*" (Italics ours.)

In *Delaware, etc. R. R. Co.* v. *Pa., 198 U. S. 341,* the Court was considering the capital stock tax upon a Pennsylvania corporation with reference to coal that had been sent out of the state for sale. It was held that the tax was essentially a property tax upon the coal. The Pennsylvania Supreme Court held that the coal was only temporarily located outside the state and, therefore, could be taxed by Pennsylvania. This Court held, however, that the coal had been sent out of Pennsylvania never to return and, therefore, could not be taxed in Pennsylvania. The Court distinguished the American Dredging Company case on this ground, saying (p. 356):

> "The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, *never to return in kind,* but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co., 122 Pa. St. 386.* That property consisted of vessels, or scows, or tugs, only *temporarily* out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any *actual situs* beyond the jurisdiction of the State itself. However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was *definitely* and *forever* beyond the jurisdiction of Pennsylvania."

* * * * * * *

> "* * * the coal had lost *its situs* in Pennsylvania by being transported from that State to foreign States for the purposes of sale, *with no intention* that it should ever return to its State of origin." (P. 360.) (Italics ours.)

While in that case the Court referred to the fact that the coal had been shipped out of Pennsylvania for sale, the importance of this was merely to support the fundamental conclusion that the coal had permanently left Pennsylvania, *"never to return."* In the case at bar, it is not contended that the Clarke pictures were sent out of New York for the purpose of selling them. The idea of a sale did not occur either to the testator or to Mr. Kimball until the spring of 1929, a year after the original loan. While, at Mr. Kimball's request, Mr. Clarke then expressed his willingness to sell the collection, this came to nothing, since Mr. Kimball was unable to find a donor able and willing to undertake the proposed gift. The essential point in the coal case was that the coal had been sent out of Pennsylvania "with no intention that it should ever return" and, therefore, Pennsylvania had lost its right to impose a property tax thereon. In the case at bar Mr. Clarke sent the pictures to Pennsylvania for the purpose of a temporary loan and with the perfectly definite and clear intention that they should be returned to him in New York City.

From the foregoing decisions it is clear that, even in cases involving property taxes, a state other than

that of the owner's domicile can constitutionally levy the tax only on property *permanently* located within its borders and is powerless to tax personalty which the owner has taken or sent there but temporarily and with the intention of bringing it back home when the object for which it has been sent to the other State has been occomplished. *A fortiori* such other state is powerless to impose an *inheritance* tax on such property merely because its owner happens to die during the interim.

As acquired in New York by Mr. Clarke over the thirty year period, the 79 paintings had, admittedly, an actual situs in the State of New York for purposes of taxation. Even if this were a case involving a property tax, the burden would clearly be on defendants to establish that the original loan, with its several renewals, to the Pennsylvania Art Museum, not only created a new "actual situs" in Pennsylvania but deprived the pictures of their original "actual situs" in New York State. The presumption would be against such a change in situs, on the analogy of those cases which hold that an original domicile is not lost until a new legal residence is clearly acquired.

This reasoning was voiced by this Court in *New York Central Railroad* v. *Miller, 202 U. S. 584.* In that case the State of New York was attempting to impose a franchise tax—admitted to be a direct property tax—upon cars belonging to a New York corporation which were at times temporarily ab-

sent from the State. The railroad contended that a considerable proportion of its cars were constantly out of the State and that such a proportion should be deducted from the taxable value of its capital stock. The Court rejected this argument and said (p. 596):

> "Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil,* which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co.* v. *Kentucky*, May 21, 1906, *ante*, p. 409. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209."

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* The similarity between the conception of domicil and that of situs of property has often been noticed. Beale, *The Situs of Things*, 28 Yale Law Journal 525. In *Selliger* v. *Kentucky*, 213 U. S. 200, 207, this Court spoke of the goods in question as "still domiciled in Kentucky." In the *Delaware, L. and W. R. R. Co.* v. *Pa. case*, 198 U. S. 341, 355, this Court spoke of coal not having "lost its original domicil." In *State* v. *Haight*, 30 N. J. Law 428, 430, the court speaks of chattels having their "home" or "place of residence" in another state.

As heretofore stated, we submit that under the later decisions by this Court, cases involving inheritance taxes are governed by different principles from those involving property taxes, and that inheritance taxes may constitutionally be exacted by a State other than that of the testator's domicile only when the tax is on the transfer of realty within the borders of the taxing State, the devolution of which its public policy requires to be governed by its own laws, or in the case of tangible personal property having a permanent situs therein for business purposes (governed by a similar principle of public policy) or tangible personal property so annexed to or associated with real estate as to be for practical purposes a part of the realty. If such be now the law, the permanent or temporary character of the presence of tangible personal property away from the decedent's domicil, has become immaterial, the sole question being whether it is part of the assets of a business in the taxing state or connected with local real estate. Such a rule is simple, easily understood, avoids the necessity of determining what was in the mind of the decedent, and avoids the continual disputes between the several States as to which is entitled to the tax on personalty which happens to be away from home at the time of the decedent's death.

If, however, the Court should deem it wise still to apply to inheritance tax cases the same principle applicable in property tax cases and make the test that of permanent or temporary location, it would seem

that the last sentence in the case of *New York Central Railroad* v. *Miller* above quoted (p. 33) furnishes a persuasive analogy. In a long line of decisions, in England and in this country, the Courts have developed the law of domicile and have settled the principles and tests to be applied in determining when the domicile of a person, originally in one jurisdiction, is held to be transferred to another.

There would seem to be no reason why, with the common law thus satisfactorily settled and understood as to the determination of the domicile of persons, the Court should be asked to lay down entirely new principles for the determination of the taxable "domicile" of personal property, particularly in view of the Court's clear statement, above quoted, that the rules determining the domicile of persons are to be "applied to inanimate things." If we thus follow the analogy of loss and acquisition of domicile, treating the pictures as original residents of New York who, it is contended, acquired a new domicile in Pennsylvania, the solution is simple.

> "* * * it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to remain there. The change cannot be made, except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell* v. *United States,* 21 Wall. 350."
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> *Sun Printing & Publishing Assn.* v. *Edwards,* 194 U. S. 377, 383.

Let us assume, for the purposes of the analogy, that instead of 79 paintings the case involved 79 painters, residents of New York in Mr. Clarke's employ, whom, at Mr. Kimball's request, he loaned to the Museum to paint the new building. Suppose further that, when the painting of the new building was completed, Kimball was so pleased with their work that, in spite of Clarke's suggestion that the painters come back home, he successfully pressed Clarke to let them stay on in Philadelphia to paint other buildings. Transferring into terms of domicile the contentions stressed by the other side in the present case, let us assume that certain of the workmen, when they came to Philadelphia, gave up their rooms in their New York boarding houses and paid no board there during their residence in Philadelphia. Also, that after their arrival in Philadelphia Kimball inquired of some of them (with Clarke's permission) as to whether, if he could secure them permanent jobs in Philadelphia, they would accept such jobs and make Philadelphia their permanent homes, and that these workmen had indicated that they would be willing to do so, but that no definite offer of a permanent job had ever been forthcoming.

Certainly under the above circumstances it could not be successfully contended that any of the workmen had lost their New York domiciles or acquired domiciles in Philadelphia. Certainly all of them would continue to vote and to pay income and personal property taxes in New York, and if any of

them had died on the Museum site his estate would have been administered in New York.

In the case at bar, the 79 paintings, from the moment that they left New York to the time of Mr. Clarke's death had, as it were, return tickets to New York, since both at the time of the original loan and also at the moment preceding Clarke's death it was understood that they would be returned to him at any time on his request, the word "return," of course, implying the return to the place of origin,—New York.

It is respectfully submitted that when the majority of the Court below stated that the analogy of domicile of persons as applied to the taxation of personal property "was urged by the minority and rejected [by the majority of this Court] in *Gromer* v. *Standard Dredging Company*," 224 U. S. 362, the lower Court wholly misunderstood that decision. The majority opinion in that case (which involved a property and not an inheritance tax) is clearly based on the assumption that, under the pleadings, the situs of the property taxed was admitted to be within Porto Rico, which sought to tax it, and therefore not before the Court for decision. The minority differed as to this, holding that the question of taxable situs was presented by the Record and that such situs was not in Porto Rico since the articles taxed were there for but a temporary purpose. But for the fact that the majority considered that the question of situs was settled in favor of Porto Rico by the admission

in the record, the decision of the entire Court would, it is submitted, have been that the tax was not lawfully imposed.

The decisions on domicile clearly hold that for the acquisition of a new domicile the intention must be to make the proposed new domicile a home at the moment and not in the future, and further, that the intention must be an absolute one and not conditional on the happening of a future event.

Section 22 of the tentative draft of the American Law Institute *Restatement of the Conflict of Laws,* with subdivision (b) of the comments and the third illustration, are as follows:

> "SECTION 22. PRESENT INTENTION.
>
> "For the acquisition of a domicil of choice the intention to make a home must be an intention to make a home at the moment, not to make a home in the future.
>
> *"Comments:*
>
> "b. The intention to make a home must be an absolute one, not conditional on the happening of a future event.
>
> *"Illustration:*
>
> "3. A goes to X intending to stay there only if he passes a certain examination, or if he can get work. A is not domiciled in X until the condition is fulfilled."

Vol. 19 of *Corpus Juris* (Domicile), p. 408, Section 21 (d), states the law relative to contingent intention to acquire domicile as follows:

"Contingent intention.—Since the intention must be present and fixed, and not ultimate, a domicile is not changed by removing therefrom and locating in a new place, with an intention to make the latter a permanent home at some future time, or upon the happening of some future and contingent event."

Footnote 14, in support of the above statement of the law, is as follows:

"(*a*) Seeking employment.—(1) Where a person removes to another state with his wife to seek employment, but fails to find work and returns alone, he does not acquire a domicile, since his intention to acquire one depended upon a contingency that never happened. Ross *v.* Ross, 103 Mass. 575. (2) Where a resident of Kansas went to Colorado, intending if successful in obtaining a situation in the public schools to remain there, and if not to return to Kansas, but was seriously injured before the result of the civil service examination which she had taken was known and thereupon went back to Kansas where she has since remained, it was held that at no time did she cease to be a resident of Kansas. Denver *v.* Sherret, 88 Fed. 226, 31 CCA 499.

"(*b*) Contingent intention to abandon.—A person having a fixed domicile and having quitted it with the proposed intention of returning, which intention may be annulled by the happening of a particular event, cannot by law be said to have abandoned his domicile. Craigie *v.* Lewin, 3 Curt. Eccl. 435."

Applying further the analogy of domicile, the length of time that the pictures were actually in Pennsylvania is material only as one factor evidencing the intention of the owner to give them a permanent situs. Where, as in the present case, the loan was admittedly temporary at its inception and was so continued by successive specified renewals, the important point is not how many months or days or years the pictures were actually in Pennsylvania, but what was their status at the moment of Mr. Clarke's death. Admittedly, on the day that Mr. Clarke died the pictures were at the Pennsylvania Museum on a loan terminable by him at any moment and under an agreement by which, at his request at any time, Kimball was bound to pack up the paintings and ship them back to New York. Any tentative and contingent arrangement for the sale of the pictures to a proposed donor had been terminated by Mr. Clarke eight months before his death, on which termination they reverted to their status as loaned temporarily to be returned to Mr. Clarke at any time on his request.

Following again the analogy of domicile, there are, of course, hundreds of Americans who have preserved their domicile in the United States and in specific States, in spite of the fact that they have continuously lived abroad or in other States.* There are hundreds more who have saved their board bills during trips abroad without thereby losing their status as citizens,

* See *Ennis* v. *Smith*, 55 U. S. 400, 423; *Desmare* v. *U. S.*, 93 U. S. 605, 610; *U. S.* v. *Knight*, 291 F. 129, 133; *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Barclay's Estate*, 259 Pa. 401; *Farmers Loan & Tr. Co.* v. *U. S.*, 60 F. (2) 618; *Union Tr. Co.* v. *Com'r.*, 5 B. T. A. 1272; *Guaranty Tr. Co.* v. *Com'r.*, 25 B. T. A. 507; *Rogers* v *Com'r.*, 17 B. T. A. 570.

and still other hundreds who have preserved their domiciles in their native States in spite of futile attempts to secure permanent business positions elsewhere. The question is not how long any of these people remained away from home, but whether they ever indicated an intention to abandon their original domicile and to remain permanently away from it. Where an adequate reason for their temporary sojourn away from home appears, there is no question of their having lost their original domicile.

In the case at bar, the pictures had admittedly an original situs in New York. They were sent to Philadelphia by the owner in March 1928 for the temporary purpose of exhibiting them at the opening of the new Museum. The period of two years and ten months during which the pictures remained at the Museum must not be regarded in gross, (as apparently the majority of the lower Court treated it) but as a series of shorter intervals at the end of each of which the loan was renewed on the express solicitation of Dr. Kimball. The Bill expressly avers (Rec. 5), and the Answer admits (Rec. 37), that "*on several occasions* subsequent to the date of the original loan" in March 1928, Clarke suggested the return of the paintings, but under pressure from Dr. Kimball to extend his loan, because of the great appreciation shown by the public, Clarke orally "consented *from time to time* to leave the paintings temporarily at the Museum" and thus, when Clarke died on January 18, 1931, they were there

on display, returnable on demand. Up to the time of Mr. Clarke's death, there is not the slightest indication of any thought on his part that they should be left permanently in Philadelphia. Indeed, if, prior to his death, Mr. Clarke had donated them to the Museum, or if by his Will he had so given them, they would be expressly exempt from inheritance tax in Pennsylvania (see Act of July 9, 1919, P. L. 794, 72 P. S. §2483).

It is with bad grace that Pennsylvania, having, for the pleasure and education of the citizens of Pennsylvania, induced Mr. Clarke, a gentleman of advanced years, to lend these pictures to the Museum, and having successfully staved off his repeated requests for their return, by successively persuading him to renew the loan, now seeks to exact this tax from his estate, merely because he happened to die before he succeeded in getting his pictures back to New York.

CONCLUSION.

It is respectfully submitted that the decree of the Court below should be reversed with directions that the injunction be granted as prayed.

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 30.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, *Appellant*,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEES

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

WM. A. SCHNADER,
Attorney General of the Commonwealth of Pennsylvania.
HARRIS C. ARNOLD,
Deputy Attorney General.
Attorneys for Appellees.

State Capitol,
Harrisburg, Pa.

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v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania, September Term, 1932, No. 7395, in equity. Opinion March 29, 1934 (R. 50).

BRIEF FOR APPELLEES

CORRECTIONS OF APPELLANT'S STATEMENT OF THE CASE

The statement of the case as set forth in appellant's brief is, on the whole, accurate, but in order to avoid any possible confusion, we feel obliged to note certain necessary corrections.

Near the bottom of page 3 of appellant's brief appears the following statement:

> "* * * the pictures were permitted * * * to remain * * * with the understanding that they would be returned to Clarke **in New York** at any time on his request."

There is absolutely no justification for the presence of the phrase "in New York," in this statement.

On page 4, appellant says:

> "It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans."

This is rather a loose paraphrase of the statement made in Paragraph 10 of the Bill of Complaint (R. 5) that "such accommodation loans of works of art [to the Pennsylvania Museum] * * * have been continued for an average period considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke."

ARGUMENT

I

SUMMARY OF ARGUMENT

With certain exceptions, not important here, tangible personal property is subject to inheritance taxation in the State in which it has its situs at the time of the death of its owner. This is true without regard to the domicile of the owner.

Appellant's attempt to deny this principle is groundless and its effort to confine application of the principle to personal property which appellant designates as "part of an established local business" or "intimately connected with real estate" has no foundation in law and is based on an entirely fanciful distinction of fact.

Moreover, since that question was not raised in or passed upon by the court below, it is too late to raise it here.

The real issue is whether the paintings here in question had an actual situs in Pennsylvania when Thomas B. Clarke died. That was the only issue in the court below.

At the time of Mr. Clarke's death, his collection of paintings was in Pennsylvania. It had been here for almost three years. During that time it had been offered for sale to any buyer who would give it to the Pennsylvania Museum, Philadelphia, for permanent exhibition. While the collection was returnable to Mr. Clarke on demand, he never, during the three-year period, made any definite arrangements to remove it

from Philadelphia. He had given up the storage space in New York in which most of the paintings had been kept prior to their removal to Philadelphia.

Under these circumstances we contend that the paintings had an actual situs in Pennsylvania when Mr. Clarke died and were taxable by, and only by, this State.

There is no decision of this court to the contrary; and certain apparently adverse language in decisions which are not relevant on their facts, was uttered without reference to a situation such as this.

To say that a state can tax tangible personal property within its borders only if the property is located there permanently in the strict sense of that word, would exempt from taxation the great bulk of such property.

II

IN GENERAL TANGIBLE PERSONAL PROPERTY IS TAXABLE WHERE IT IS FOUND

Generally speaking, tangible personal property is taxable where it is, regardless of the owner's domicile.

Of course, a state cannot impose a property tax on tangible property *in transitu* through the state or upon property which has come to rest within the state

for a fleeting time, the owner having a present intention promptly to remove it. These propositions do not require the citation of authority.

Possibly, property necessary for the transaction of certain types of business is not subject to the general rule which we have stated. We have in mind vessels, rolling stock of railroads, dredging equipment, road-building machinery, and the like. See HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855); PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA, 141 U. S. 18 (1891); UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905); NEW YORK EX REL. NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. MILLER, 202 U. S. 584 (1906); JOHNSON OIL REFINING CO. v. OKLAHOMA, 290 U. S. 158 (1933); the dissenting opinion in GROMER v. STANDARD DREDGING CO., 224 U. S. 362 (1912); COMMONWEALTH v. AMERICAN DREDGING COMPANY, 122 Pa. 386 (1888); CAPITAL CONSTRUCTION CO. v. DES MOINES, 211 Iowa 1228, 235 N. W. 476 (1931). Such property must be moved from place to place to enable the owner's business to be carried on. It would be extremely inequitable, to say the least, to enable the property to be taxed wherever it had come to rest; in the course of a year the property might become subject to taxation in a number of jurisdictions.

But, where the property involved is not of such a nature that its very use necessitates its movement from place to place, we submit that it is taxable where it has come to rest for an indefinite time.

Also, it is axiomatic that tangible personal property cannot be taxed by a state if the property has been permanently removed from the state: DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. v. PENNSYLVANIA, 198 U. S. 341 (1905); UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905).

1. Authorities for the General Rule

To establish the general rule which we have stated, we cite FRICK v. PENNSYLVANIA, 268 U. S. 473 (1925), and BLODGETT v. SILBERMAN, 277 U. S. 1 (1928).

In the FRICK CASE, Mr. Frick having been domiciled in Pennsylvania, that State attempted to levy an inheritance tax upon property of his estate, as follows (page 487): (1) Rare paintings, rugs, furniture, bronzes, porcelains, and other art treasures housed in a building in New York City especially constructed for the purpose; (2) Furniture, household furnishings, automobiles, tools, etc., in Mr. Frick's New York house and garage; and (3) Paintings, household furnishings, farming implements, etc., on Mr. Frick's estate at Prides Crossing, Massachusetts.

This court held that the property was beyond Pennsylvania's taxing power.

There was no discussion, in the opinion, of the question whether the property was "permanently" in New York and Massachusetts. The essence of the court's de-

cision was stated by Mr. Justice Van Devanter, at page 489:

> "* * * as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner. * * *"

At page 491, after discussing and quoting from UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905), and UNITED STATES v. BENNETT, 232 U. S. 299 (1914), Mr. Justice Van Devanter said:

> "Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing save as that state expressly or tacitly adopts them,—their bearing then being attributable to such adoption, and not to any force of their own. * * *"

And at page 492:

> "* * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states,—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts.

> In these respects the situation was the same as if the property had been immovable realty. * * *"

In the BLODGETT CASE Connecticut attempted to impose an inheritance tax on bank notes and coin which belonged to a resident of Connecticut but at his death were in a safe deposit box in New York. This court held that Connecticut could not impose the tax.

At page 18, Chief Justice Taft said:

> "* * * But we think that money, so definitely fixed and separated in its **actual situs** from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick Case to be taxable only in the jurisdiction where they were."

In that case the decision was based upon the mere presence of the money in New York.

Under the principles enunciated in these decisions, New York could not tax the Clarke paintings; Pennsylvania could tax them.

2. Intangible Property Tax Cases

Repeatedly this court has said that the rules relating to the taxation of tangible property are different from those governing the taxation of intangible property: FRICK v. PENNSYLVANIA, supra, at page 494; UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194, 206 (1905).

Therefore, the intangible property tax cases cited by the appellant as the basis for its argument have little, if any, importance here.

Some of these cases are now relied upon by the appellant, because of certain expressions in the opinions, not necessary to the decisions. Other cases of the same type were cited by appellant in the court below and in its brief filed in this court when the case was here before, but they have been dropped from its present brief.

In SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. VIRGINIA, 280 U. S. 83 (1929), this court did state that "tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place". We repeat, that proposition is axiomatic. However, it does not follow by any means that the converse is true and that a state may tax tangible personal property within its borders only if the property is permanently located there.

And, in any event, the facts of the case show that the word "permanently" was not used in its ordinarily strict sense. The court ruled that certain securities held in trust in Maryland by a Maryland corporation could not be made the subject of taxation by the State of Virginia, which was the domicile of the beneficiaries of the trust. At page 92, the court said that these securities had "a permanent situs for lawful taxation" in Maryland. But, by the express terms of the trust,

the trust res would become the property of the Virginia beneficiaries at a fixed time some years thereafter. Therefore, it is obvious that the term "permament situs" was not used to mean location within the state in such a manner that the property could never be removed. On the contrary, there was a definite time fixed when it would become the property of residents of Virginia, and, as it was intangible property, it would then be taxable only at the domicile of the owners: First National Bank of Boston v. Maine, 284 U. S. 312 (1932).

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930), is cited by the appellant for the proposition that a state cannot tax tangible property which has been permanently removed from its borders. This cannot be disputed.

First National Bank of Boston v. Maine, 284 U. S. 312 (1932), is cited for the proposition that personal property is immune from taxation by more than one state at the same time or for the same period. This also is conceded, but has no importance here.

It is our position that the Clarke collection is not subject to inheritance taxation by New York and Pennsylvania, but is subject to such taxation only by Pennsylvania. There is no question of double taxation here. If appellant has paid a tax to New York, it did so voluntarily and with knowledge of the claims of Pennsylvania. That payment did not determine

that New York had a legal right to exact the tax. We have no doubt that the presence in this court of the Tax Commission of New York as *amici curiae* both when this case was here before and on the present appeal indicates that New York has no intention of refusing to refund the tax already paid if this court determines that the paintings are taxable by Pennsylvania.

The appellant also emphasizes the quotation from the opinion in FIRST NATIONAL BANK OF BOSTON v. MAINE, that, as respects tangible personal property, "The rule [*mobilia sequuntur personam*] has gradually yielded to the law of the place where the property is kept and used."

Why this is important to the appellant we fail to see. The Clarke pictures were kept in Pennsylvania, and used in Pennsylvania. They certainly were not being kept or used in New York.

3. Cases Involving Vessels, Rolling Stock, etc.

We shall now briefly discuss the cases dealing with the taxability of vessels, railroad rolling stock and the like.

In HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855), California sought to tax ocean-going vessels, plying between New York, San Francisco and other ports. New York was the registered home port of the

vessels. The vessels merely touched the port of San Francisco to discharge and take on cargoes, and to receive such attention as was necessary to enable them to proceed. The duration of the stay was usually ten or twelve days.

This court held that "the State of California had no jurisdiction over these vessels for the purpose of taxation."

On the other hand, where ships have been used and kept only within the boundaries of a single state for a number of years, they do acquire a taxable situs there: OLD DOMINION STEAMSHIP CO. v. VIRGINIA, 198 U. S. 299 (1905).

In NEW YORK EX REL. NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. MILLER, 202 U. S. 584 (1906), the State of New York was permitted to impose a franchise tax on all the property of the railroad, including all of its cars. This court held it immaterial that some if not all of the cars, spent a part of the tax year in other states; but it did "not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there" (p. 597).

In GROMER v. STANDARD DREDGING CO., 224 U. S. 362 (1912), Porto Rico was permitted to tax dredging equipment used in the harbor of San Juan for fulfilling a contract with the United States Government. At page 372, Mr. Justice McKenna said:

> "The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be * * *."

In UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905), Kentucky sought to tax cars permanently located in other states, and employed in such states for the purposes of the owner's business. This court held that the tax could not be imposed.

In PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA, 141 U. S. 18 (1891), this court had before it the question of the taxability of cars operated by the Pullman Company on railroads extending in and through Pennsylvania. Pennsylvania had levied a capital stock tax against the company, based on a calculation of the average number of cars employed in the State, the company being a foreign corporation.

Although the constitutional objection to the tax was that it constituted a burden on interstate commerce, the court was obliged to determine whether property of the company, namely cars, had a taxable situs in Pennsylvania, in spite of the fact that they ran on lines which extended beyond the borders of the State.

This court ruled that the company had and used property which was sufficiently within the jurisdiction of Pennsylvania to give it a taxable situs there. The

following excerpts from the opinion are pertinent here (p. 22):

> "'* * * A nation within whose territory any personal property is **actually situate** has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'
>
> "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the **place where it is**, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. * * *"

In distinguishing the facts of the PULLMAN CASE from earlier cases concerning taxability of ships in foreign ports, (*e. g.* HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 [1855]), Mr. Justice Gray said (141 U. S. at p. 23) that the ships were not taxable because they were not "in any proper sense, abiding within" the limits of the state in which the foreign port was located.

JOHNSON OIL REFINING CO. v. OKLAHOMA, 290 U. S. 158 (1933), also concerned the taxation of railroad cars moving in and out of a state at frequent intervals. This court permitted a state other than the state of the owner's domicile to tax the cars, but limited the right in such a manner as to be "consistent with the like jurisdiction of other states." That expression can have no application to the present case. We have here

no question of divided or overlapping jurisdictions. If Pennsylvania may tax these pictures, New York may not.

In COMMONWEALTH v. AMERICAN DREDGING Co., 122 Pa. 386 (1888), the Supreme Court of Pennsylvania held that tug boats, scows and dredging machinery are taxable at the domicile of the owner. The court rested its decision squarely on the ground that (p. 391):

> "* * * From the nature of the business, it [the equipment of the dredging company] is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. * * *"

COMMONWEALTH v. UNION PACIFIC R. R. Co., 214 Ky. 339, 283 S. W. 119 (1926) represents another aspect of the special rules which the courts apply to taxation of railroad cars under our complicated system of transportation.

Even these cases, dealing with tangible personal property which must be moved from place to place to enable its owner's business to be carried on, adhere very closely to the general rule that actual situs, not domicile of the owner, is the test of the right to tax. In the cases in which the state of the domicile was permitted to tax the property, the property did not have an actual situs in any other state. This was clearly the situation in HAYS v. PACIFIC MAIL STEAMSHIP Co., NEW YORK EX REL. ETC., v. MILLER and COMMONWEALTH v. AMERICAN DREDGING Co.

4. The General Rule Applies to Inheritance Taxes

In the court below the issue was whether the portraits here involved had acquired a taxable situs in Pennsylvania, and the court disposed of the case on that basis. There was never a suggestion from the appellants that it was their theory of the case that tangible personal property cannot under any circumstances be subject to inheritance taxation except at the domicile of the owner. All parties assumed that tangible property could have a situs for inheritance tax purposes apart from the domicile of the owner, and the case was submitted to the court on that theory. The only question was whether there was such a situs here.

Appellant now attempts to raise a new issue in this court. In the first three subdivisions of its brief, it argues to the effect that in no case may inheritance tax be constitutionally imposed on the transfer of tangible personal property except at the domicile of the owner, and that the situs of the property is of no importance.

Since this represents a substantial change of the theory on which the case was tried in the court below, we submit that under accepted principles of appellate practice it is now too late to raise the question, and that the case should be considered here on the issues which were raised in the court below and passed upon by it: UNITED STATES v. LA FRANCA, 282 U. S. 568,

576 (1931); 2 R. C. L. 182 Sec. 156; 1 R. C. L. Perm. Supp. 363; 3 C. J. 718.

The appellant's entire argument on this point centers about its assumption (See appellant's brief p. 14) that tangible personal property passes to legatees solely by virtue of the law of the state of the testator's domicile even though the property has an actual situs in another state at the time of his death. In support of it, appellant quotes from the tentative draft of the Restatement of Conflict of Laws, and from EIDMAN v. MARTINEZ, 184 U. S. 578, 591 (1902). It contends from these authorities that the law of the state of the domicile operates to transfer the title under the will of the owner by its own force and independently of the law of the state of the situs of the property. That proposition is not sustained by the cases cited. The farthest extent to which they go is to say that property in another state passes in accordance with the law of the state of domicile **because the state of situs recognizes and permits application of the law of the state of the domicile.** Even on the strongest statement of the proposition contained in the appellant's authorities there must be taken into consideration the fact that the state of the situs of the property has jurisdiction of the property itself. The law of domicile applies only because of consent of the state of the situs. And necessarily that consent is subject to the exercise of such powers of the sovereign state of the situs as that state may choose to exercise. The primary fact is that the state of situs has jurisdiction

of the property itself. Therefore, if it consents to the application of the law of the domicile, it may and does condition that consent upon recognition of the exercise of its own sovereign power to tax.

However, the form in which the appellant argues as to the effect of the law of the domicile on devolution of tangible personal property in another state, as well as its whole proposition on this point, is in direct conflict with the clear declarations of this court in FRICK v. PENNSYLVANIA, 268 U. S. 473 (1925), supra.

In the FRICK CASE the actual decision was that tangible personal property is not subject to inheritance taxation at the domicile of the owner, if the property has its situs in another state, because such property is taxable only in the state of its situs. In addition to the passages herein before quoted from the opinion in the FRICK CASE, the following portions of the opinion of Mr. Justice Van Devanter are pertinent:

> (Page 490) " 'The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectable, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner.' "

(Page 492) "* * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states,—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. **The jurisdiction possessed by the states of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer.**

"Mr. Justice Story said in his work on Conflict of Laws, section 550: 'A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property.' * * *" (Bold face ours).

(Page 493) "In support of the tax, counsel for the state refer to statutes of New York and Massachusetts evidencing an election by those states to accept and give effect to the domiciliary law regulating the transfer of personal property of owners dying while domiciled in other states; and

from this they contend that the transfer we are considering was brought under the jurisdiction of Pennsylvania, and made taxable there. We think the contention is not sound. The statutes do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it. They declare what law shall apply, and require the local courts to give effect to it. And it should be observed that here the property was administered in those courts, and none of it was taken to the domiciliary state. **Obviously the accepted domiciliary law could not, in itself, have any force or application outside that state. Only in virtue of its express or tacit adoption by the states of the situs could it have any force or application in them. Through its adoption by them it came to represent their will, and this was the sole basis of its operation there.** Burdick, American Const. section 257. In keeping with this view, New York and Massachusetts both provide for the taxation of transfers under the adopted domiciliary law; and they have imposed and collected such a tax on the transfer we are now considering.

* * * * *

"We think it follows from what we have said that the transfer of the tangible personalty in New York and Massachusetts occurred under and in virtue of the jurisdiction and laws of those states, and not under the jurisdiction and laws of Pennsylvania, and therefore that Pennsylvania was without power to tax it." (Bold face ours).

Appellant seeks to avoid the effect of the FRICK CASE by trying to confine its application to personal

property which "was an essential part of the establishment," or was "intimately connected with real estate" or "property so annexed to or associated with real estate as to be for practical purposes a part of the realty" (appellant's brief, pages 21, 23, 34). We are at a loss to perceive how any course of reasoning could deduce such a principle from the opinion in the FRICK CASE. The property involved in the FRICK CASE included paintings, rugs, furniture, bronzes, porcelains and other art treasures not unlike the property here in question, and also ordinary furniture, household furnishings, automobiles, tools and farm implements (268 U. S., at page 487). A suggestion that such a widely diversified list of personal property including, particularly, automobiles, is so intimately connected with real estate as to be part of the real estate, is too fantastic to merit further attention.

Therefore, we submit that the general rule of taxation above stated applies to inheritance as well as other taxes and that the only issue before this court is whether the circumstances of this case show that the portraits in question had acquired an actual situs in Pennsylvania at the time of the death of Mr. Clarke.

5. What is Taxable Situs?

A true description of the requisites for the acquisition of a taxable situs is set forth in 2 COOLEY ON TAXATION (4th Ed.), Section 452, page 982, as follows:

> "In order to acquire a situs in a state or taxing district so as to be taxable in the state or district

> regardless of the domicile of the owner and not taxable in another state or district at the domicile of the owner, tangible personal property must be **more or less permanently** located in the state or district. * * *"

And again, after pointing out that property in transit does not acquire a situs within the state until the transit has ended, the author says (pages 987-988):

> "A more difficult question arises where the transit element is wanting or is subordinate, as where personal property comes into a state to be kept there or used there for a considerable period of time but with no intention perhaps of keeping it there permanently. The governing rule, as usually stated, is that the taxable situs depends on whether the property is 'permanently' within the state. However, in this connection, the word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case. **It means a more or less permanent location for the time being.** * * *"

On this point, BLACKSTONE v. MILLER, 188 U. S. 189 (1903), is important. We realize that it has been overruled insofar as it held that intangible property could be taxed elsewhere than at the owner's domicile. But it is still a precedent on the question of the acquisition of a taxable situs.

This court decided in that case that money collected by a New York agent of a resident of Illinois, and held by the agent in its bank in New York subject to order of the owner, was subject to an inheritance tax in New

York upon the death of the owner while domiciled in Illinois.

Concerning the acquisition of a taxable situs in New York, Mr. Justice Holmes said (page 203):

> "* * * It is probable, of course, that he [the non-resident owner] did not intend to leave the fund there forever, and that he was looking out for investments, but he had not found them when he died. * * *
>
> "* * * We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state. **The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year,** so that this finding at least was justified. * * *"

The foregoing language aptly applies to the present case. Here the indefinite time had lasted for almost three years.

When speaking of the taxability of tangible property, Mr. Justice Holmes said (page 204) that it may be taxed "wherever the property is found."

The BLACKSTONE CASE is authority for the proposition that property left in a state other than the state of the owner's domicile for an indefinite time,—in that case, only a year,—acquires a taxable situs, even though the owner did not intend to leave the property

there forever, but only while he arranged for further disposition of it.

We earnestly submit that the FRICK CASE, BLODGETT v. SILBERMAN and other authorities cited make it clear that tangible personal property, other than that peculiarly useful for mobile pursuits, is taxable in the state in which it has come to rest for an indefinite time.

III

THE CASES CITED AS APPLIED TO THIS CASE

We have discussed not only the cases upon which we rely, but also those cited in opposing briefs.

How do the cases cited apply to the facts involved in the present case?

We submit that HAYS v. PACIFIC MAIL STEAMSHIP CO., NEW YORK EX REL. NEW YORK CENTRAL ETC., RAILROAD v. MILLER, JOHNSON OIL REFINING CO. v. OKLAHOMA, COMMONWEALTH v. AMERICAN DREDGING COMPANY, and COMMONWEALTH v. UNION PACIFIC R. R. Co., are wholly inapplicable. Ocean vessels, railroad rolling stock, dredging equipment, and road-building machinery, going from state to state, must be treated as a special class of property for which special rules must be provided.

However, even though they involved these special classes of property PULLMAN'S PALACE CAR COMPANY

v. PENNSYLVANIA and GROMER v. STANDARD DREDGING Co., are authorities sustaining Pennsylvania's right to tax the Clarke paintings.

As the Clarke paintings were not permanently outside of Pennsylvania on the date of Mr. Clarke's death, the decisions in DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. v. PENNSYLVANIA and UNION TRANSIT CO. v. KENTUCKY are of little value in determining whether **Pennsylvania** could tax the paintings. But the former case is authority for the proposition that **New York** could **not** tax the collection.

In the D. L. & W. CASE the coal had been shipped out of Pennsylvania to be sold. It could be returned to that State, but the possibility was remote.

After the Clarke collection reached Pennsylvania it was offered for sale provided it should be left by the buyer at the Pennsylvania Museum for exhibition. If sold, it could not go back to New York.

The FRICK CASE and BLODGETT v. SILBERMAN deny New York's right to tax, and, therefore, sustain Pennsylvania's right.

In the FRICK CASE, the household furniture, automobiles, tools, etc., in the New York house and garage and at Prides Crossing, Massachusetts, could readily be interchanged with property of a similar nature in Mr. Frick's Pennsylvania home. They were movable property.

There is no distinguishing feature here. Mr. Clarke's pictures were in Pennsylvania. There was **presently** no other place for them. They might have been returned to New York if Mr. Clarke had seen fit to procure a place to put them, but he did not do so. Had the pictures been sold, under the option given by Mr. Clarke, they would have remained in Pennsylvania.

Pennsylvania was not permitted to tax the tangible personal property in the Frick houses in New York and Massachusetts. New York could not validly tax the Clarke collection.

In BLODGETT v. SILBERMAN the currency was in New York. Therefore Connecticut could not tax it.

In this case, the pictures were in Pennsylvania. Therefore, New York could not tax them.

Appellant's efforts to distinguish the BLODGETT CASE on page 25 of its brief, on the ground that the money in that case had never been permanently located in the state of the owner's domicile is baseless. In the first place, none of the cases set up any such standard. Secondly, the pictures in this case were not "permanently" located in New York. If they had been, they could never have come to Pennsylvania. If appellant means that they had been "permanently" located in New York because their stay there had been indefinitely prolonged with no immediate intent of the owner to take them elsewhere, we agree, for by the same standard, after the owner had moved them from

New York, they were "permanently" located in Pennsylvania.

In neither the FRICK CASE nor the BLODGETT CASE was there any discussion about the **permanency** of the presence of the property where it was found on the date of the owner's death. It was taxable where it was, and not taxable by the state of the owner's domicile.

COMMONWEALTH v. CLYDE STEAMSHIP CO., 268 Pa. 278, 281 (1920), involved no question of situs. The statement quoted on page 23 of appellant's brief is from an opinion of a lower court and is made simply with respect to a case cited by counsel.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE v. VIRGINIA, FARMERS LOAN & TRUST CO. v. MINNESOTA and FIRST NATIONAL BANK OF BOSTON v. MAINE do not apply to this case because they involved the taxability of intangible,—not tangible,—property.

IV

DISCUSSION OF THE FACTS

We repeat that nowhere in the record is there any justification for the statement which occurs in opposing briefs that Mr. Clarke at any time intended that his paintings should be returned to New York. He had made a loan, not a gift. Therefore, the paintings were to be returned to him, but there is nothing

to show that he had a definite intention that they should go back to New York.

Appellant's analogy to a return trip ticket (Brief p. 37) is not at all apt. The Philadelphia Museum was bound to return the pictures to Clarke wherever he might have required. The pictures were to be returned to a person, not to a place. The trip of four pictures to Virginia was scarcely consistent with the theory of a round trip ticket from and to New York.

Mr. Clarke, immediately upon making the loan, gave up the storage space where most of the paintings had been kept while in New York. This is eloquent evidence of his intention to keep the pictures in Pennsylvania for an indefinite time.

About a year after the loan was made (R. 36), Mr. Clarke gave to the Director of the Pennsylvania Museum in Philadelphia what amounted to an option to buy his entire collection. However, he made it a condition that the purchaser must present the collection to the Pennsylvania Museum at Philadelphia. Obviously, this option contemplated that the paintings would remain permanently in Philadelphia.

This option continued from about March, 1929, to July 17, 1930. Thereafter, until the time of his death on January 18, 1931, Mr. Clarke was willing to dispose of his pictures to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institu-

tion and who would pay the price set upon it by Mr. Clarke (R. 36).

Such a sale would certainly not involve the return of the paintings to New York unless the "substantially similar institution" might happen to be a New York institution.

In April, 1929, four portraits were sent from Philadelphia to Richmond for exhibition. In May of the same year they were returned, not to New York, but to Philadelphia. That was their situs for the time being.

When Mr. Clarke died, the pictures were in Pennsylvania, where they had been for two years and ten months.

Under these facts there cannot be a doubt that for at least a year and ten months prior to Mr. Clarke's death, his paintings had been in Pennsylvania under conditions indicating that they might never be returned to New York.

The District Court gave careful consideration to all these facts and to the pertinent cases, and then found as the ultimate fact (R. 56) that at the time of the death of Mr. Clarke, these pictures had an actual situs in Pennsylvania. We submit that this finding was entirely correct.

We do not argue that the pictures were "permanently" in Pennsylvania. As the court below pointed

out, the term "actual situs" does not necessarily include an idea of permanency, "and in the true sense, permanency of location can never be predicated of personal property" (R. 51).

But the pictures were located in Pennsylvania for an indefinite time. They had an actual situs here. They were commingled with other property of a like character in Pennsylvania. They were housed and exhibited in a great public museum with other valuable works of art. They were being protected by Pennsylvania. As between New York and Pennsylvania, Pennsylvania is the state which had the power to tax them at the time of Mr. Clarke's death.

If it be argued that under the decisions it must be shown that the property was being "kept and used" in Pennsylvania, the facts meet that test. The paintings were kept in Pennsylvania, and they were used here for the only purpose for which paintings can ever be used.

It is interesting to reflect that before the paintings came to Pennsylvania, most of them were in storage. They had been kept in New York, but not used.

If there is any importance attached to the fact that on several occasions Mr. Clarke "suggested" that his collection be returned (R. 5), and, if these suggestions can be construed as declarations of intention to return the paintings to New York, they were, when not carried out, what are known in the law of domicile as mere floating intentions and, as such, were not sufficient to

shift the situs for taxation from Pennsylvania back to New York. See GILBERT v. DAVID, 235 U. S. 561, 569 (1915); DORRANCE'S ESTATE, 309 Pa. 151, 172 (1932), certiorari denied, 288 U. S. 617 (1933).

Suppose Mr. Clarke had leased a property in Philadelphia from month to month, and had moved his paintings into the leased property, and, under his own name had exhibited them, either free or for an admission fee. Suppose that the exhibition had lasted for almost three years, and that during the course of it, Mr. Clarke had offered the collection for sale to anyone who would agree not to move the paintings out of Philadelphia.

Could anyone doubt that under these circumstances, the property would have been subject to the jurisdiction of Pennsylvania; that the property would have had an "actual situs" here?

The real facts are equally as strong.

There is no doubt that, in the language of COOLEY, the paintings were "more or less permanently" located in Philadelphia "for the time being."

The presence of the pictures in Pennsylvania was as permanent as any location of personal property is likely to be. It was of a decidedly more permanent character than the presence of the securities in Maryland in SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. VIRGINIA, more permanent than the location of the funds in New

York in BLACKSTONE v. MILLER, and more permanent than the Pullman cars in the PULLMAN CASE.

The pictures were "actually situate" in Pennsylvania; they were "abiding within" its limits; they constituted "property found within its jurisdiction."

V

CONCLUSION

The defendants have a right, as officers of Pennsylvania, to tax any tangible personal property which has an actual situs in that State; and

The Clarke collection of paintings under the facts set forth in the pleadings and the stipulation of counsel, had an actual situs in Pennsylvania on the date of Mr. Clarke's death.

Therefore we respectfully submit that the decree of the District Court should be affirmed.

WM. A. SCHNADER,
Attorney General.

HARRIS C. ARNOLD,
Deputy Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1934. No. 30.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, *Appellant*,

vs.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania, *Appellees*.

MOTION ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*, and BRIEF.

SETH T. COLE,
Counsel for
Amici Curiæ.

BATAVIA TIMES, LAW PRINTERS,
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COME Now, Mark Graves, John J. Merrill and John P. Hennessey, constituting the Tax Commission of the State of New York, and move this Honorable Court for leave to file the annexed brief as *amici curiæ*.

SETH T. COLE,
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BRIEF ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK AS *AMICI CURIAE.*

Statement.

This case is here on appeal from the United States District Court for the Eastern District of Pennsylvania, which dismissed a bill of complaint in equity seeking an injunction restraining the appellees, as officers of the Commonwealth of Pennsylvania, from assessing and collecting inheritance taxes from the appellant in the estate of Thomas B. Clarke, deceased.

Inasmuch as the facts of the case are before the Court upon the record and have been summarized in the briefs of the parties, it is deemed unnecessary to recite them in detail here.

The question at issue is whether the collection of portraits owned by Mr. Thomas B. Clarke during his lifetime, which in 1928 were loaned by him to the Philadelphia Museum of Art for exhibition purposes, and which remained on exhibition in said museum up to the time of his death on January 18, 1931, are subject to the death or inheritance tax of the Commonwealth of Pennsylvania, by virtue of such portraits having acquired an actual situs in said Commonwealth with such a degree of permanency as to divorce them from the operation of the law of the State of New York, in which state Mr. Clarke was domiciled, and subject them to Pennsylvania law; in other words, the question is whether the transfer of said portraits upon the death of the owner was effected by the law of New York, on the one hand, or by the law of Pennsylvania, on the other.

Argument.

POINT I.

The collection of portraits owned by Mr. Thomas B. Clarke at the time of his death, which he had loaned to the Philadelphia Museum of Art, had its situs at his domicile in New York and the transfer thereof was effected by New York Laws. For these reasons the Commonwealth of Pennsylvania is without jurisdiction to impose a death or inheritance tax.

It is well settled by the decisions of this Court that, as between states of the Union, the one which has jurisdiction to impose a death tax upon the privilege of succession from a decedent is that state under the laws of which the transfer is effected. No other state may exact a death tax, with a possible exception, based upon so-called "business situs," which is not here involved and need not be considered.

Frick v. Pennsylvania, 268 U. S. 473;
First National Bank of Boston, Executor of Haskell v. State of Maine, 284 U. S. 312.

It is conceded that the portraits, the death taxation of the transfer of which is involved in this proceeding, had a permanent situs in the State of New York prior to the time they were shipped to Philadelphia. It also seems to be agreed by the parties that if thereafter these portraits acquired such a situs in Pennsylvania that the law of that state accomplished their transfer upon Mr. Clarke's death, either directly or by recognition of the law of New York (*Frick v. Pennsylvania*,

supra), the asserted right of Pennsylvania to tax such transfer must be upheld, but that if they had only a temporary location in Pennsylvania and retained their permanent situs at the testator's domicile in New York, they were transferred upon his death pursuant to the laws of that state, and are subject to death taxation there. Hence, it must be decided whether upon the facts of the case, the paintings had lost their permanent situs in New York and acquired a new permanent situs in Pennsylvania.

It is now settled by the decisions of this Court that the transfer of real property can be subjected to death taxation only by the state of its situs, and also that intangible personal property (with the possible exception of such as may have a business situs in a state other than that of the owner's domicile) has its situs at the domicile of the owner and that the transfer thereof by reason of the owner's death may be taxed only by the state of such situs. With respect to tangible personal property, the trail is not so clearly blazed. If tangible personal property has an actual or permanent situs in a state other than that of the owner's domicile, the toll of death duties with respect thereto must be paid to the state where it is so situated, and, of course, if its actual or permanent situs be in the state of the owner's domicile, it may be there subjected to death taxation and not elsewhere. But, where tangible personal property at the time of the owner's death is physically in a state in which he was not domiciled, for a temporary period or purpose and without intent of permanency, it is believed that control of death taxation of the transfer of such property rests

with the state of domicile and not with the state where such tangible personal property is physically located, because, as a matter of law, the actual or permanent location of such property continues to be at the owner's domicile.

As is pointed out in appellant's brief, from a legal standpoint the question here involved is closely analogous to that of domicile. That is to say, the *domicile* of the property must be determined. A person's domicile of origin persists until it is shown to have been changed, and two things are necessary to establish a change, viz., actual residence elsewhere than at the domicile of origin, plus an intention to make such residence the domicile. The rule with respect to the situs of tangible personal property should be, and is believed to be, similar. Not alone should it be required that there be physical presence of the property away from the owner's domicile, but it should be coupled with an intent on the part of the owner that it should have an actual or permanent situs where so located, such intent to be established by reference to all the facts and circumstances of the case, as is done where the domicile of a person is at issue.

That the intent of the owner may affect the status of property cannot be questioned. A common example of the application of this principle is found in the rule of law applicable to fixtures. This rule is summarized in 26 Corpus Juris 654, as follows:

> "In the modern cases it is usually stated that whether an article or structure is part of the realty is primarily a question of the intention with which it was annexed or put in position, it being

> a part of the realty if there was an intention to make it a permanent accession to the land, and only then."

If tangible personal property may become real property or retain its character as tangible personal property, dependent upon the intention with which it is annexed to real property, there being no physical difference in the one case or the other, so far as the annexation is concerned, it would seem that the intention should play a prominent part in determining whether tangible personal property has acquired a permanent situs in one place or another. In other words, intent affects status and must also be held to affect situs.

The decedent, Mr. Clarke, was a patron of the arts, and at great expense and effort, over a period of years, had had assembled the finest collection of early American portraits in existence, a collection that was and is of world wide interest and of great value. He kept these paintings at his domicile in New York but was generous in making them available to public inspection by loaning them from time to time for exhibition on various occasions. Even while the collection was on exhibition at Philadelphia, he loaned part of it for exhibition in Virginia. His act in loaning the collection to the Philadelphia Museum of Art was not primarily one of his own volition. He did so at the solicitation of his old time friend, Dr. Kimball, and in connection with the opening of the Museum, of which his friend was the director. He made the loan without charge or expectation of recompense, although no doubt he could have secured substantial sums for the

use of the collection by other institutions. It appears very clearly from the record that he had no intention whatsoever that during his ownership the paintings should remain in Philadelphia permanently, but always intended that they should be returned to their regular place of custody at his home and domicile in New York. Although the record shows that Mr. Clarke expressed a willingness to sell the collection under certain specified conditions, it is thought that this fact is of no importance so far as the issue here is concerned.

The appellees properly suggested in their argument at an earlier stage of this proceeding that works of art are of no value if locked up and concealed from public view, but rank with the proverbial light hidden under a bushel. The real value of art is its display where people may see it. Fortunate is any community to be peopled by men and women who have a knowledge and appreciation of the fine arts. When Mr. Clarke consented to the exhibition of his collection in Philadelphia, he conferred a great boon, not alone on that city but on the entire State of Pennsylvania, whose metropolis Philadelphia is. His act materially added to the cultural development of the people of the City of Philadelphia and the State of Pennsylvania, but, if the taxing authorities of the state succeed in their effort to exact the taxes here in controversy, the effect can only be to discourage like generosity on the part of others.

The policy of the Commonwealth of Pennsylvania with respect to public art exhibits is shown by its statute exempting bequests or art objects for such purposes from death taxation (Act of July 9, 1919, P. L.

794, as amd. by Act of June 12, 1931, P. L. 553—pp. 5-6 of Record). This statutory provision is persuasive evidence that the Legislature of Pennsylvania never intended to tax the transfer of such objects merely because they happened to be on exhibition in that state at the time of the owner's death.

The value of the paintings was $714,750, upon which the annual increment would be, say, $35,000. This sum Mr. Clarke gave freely and willingly for the benefit of Pennsylvania and Pennsylvanians. In reciprocation, the taxing authorities of that state seek to compel the payment of a ten per cent tax by the beneficiaries of his will. Public policy and the encouragement of others to emulate Mr. Clarke's example should be strongly persuasive to a decision that will not impose a penalty for his bounty.

The temporary character of the location of the portraits in Philadelphia is manifested when it is borne in mind that they were originally loaned for use only in connection with the formal opening of the museum. There can be no doubt but that during the time of the opening exhibition the presence of the paintings in Pennsylvania was only temporary and of a transitory character. Thereafter, from time to time, Mr. Clarke requested their return, but on each occasion, at the earnest solicitation of Dr. Kimball and because of the great appreciation shown by the Pennsylvania public, he consented to leave the paintings at the museum for a further temporary period. Altogether the paintings had been on exhibition at the museum for approximately two years and ten months prior to the decedent's death. The original loan was

not for that period, or for any definite period, and actually was intended to be for a much shorter time. The fact that several requests for the return of the paintings were made during the period of the loan establishes that the decedent did not intend to leave them in Philadelphia for any extended period of time. Furthermore, since several such requests were made, it must have been that only a short time intervened between each request. If necessary to support a decision in favor of appellant, this Court might well find that each request for the return of the collection was sufficient to establish a new date from which to compute the time element to be taken into consideration in determining the question of the acquisition of permanent situs in Pennsylvania.

Appellees have sought to make some point of the fact that immediately after making the loan of the portraits, Mr. Clarke gave up the storage place in New York where most of them had been kept. Suffice it to say that storage space in warehouses in New York is seldom at a premium, and there was, of course, no good reason why Mr. Clarke should continue to pay for storage which he was not using. Any suggestion that Mr. Clarke profited because of having been relieved from the payment of storage would, of course, be absurd.

It is well established that the character and use of tangible personal property has much to do with the determination of the question of whether or not it has acquired a permanent situs when separated from the domicile of the owner.

(See *Irvin v. N. O., St. L. & C. R. R. Co.*, 94 Ill. 105.)

Reference is made to a Pennsylvania decision, which seems to have attained the status of a leading case, since it has frequently been referred to with tacit approval in opinions of this Court. This decision is *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386, in which it appeared that a Pennsylvania corporation owned certain dredges and a tug boat and scows which were located outside the State of Pennsylvania. The corporation was assessed for taxation upon its capital stock, including the value of these vessels, although they had not been within the limits of the state during the entire tax year. It objected to the inclusion of the value of the vessels in its capital stock, upon the ground that since they were without the state and had never been within it, they were not liable to taxation by the state. It was held that the value of this tangible personal property was properly subjected to tax, the Court saying (p. 391):

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another state, it would be liable to taxation there. But the facts show that it is not permanently located out of the state. From the nature of the business, it is in one place today and in another tomorrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here, it escapes altogether. The rule as to vessels engaged in foreign or inter-state commerce is that their situs for the purpose of taxation is their home port of registry or the residence of their owner, if unregistered; Pullman Palace Car Co., 29 Fed. Rep. 66; Hays v. Pacific Mail Steam-Ship Co., 17 How. 596. These vessels, if they may be so called, were not registered. Hence, their situs for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in

> another state as to be liable to taxation under the laws of that state."

It is common knowledge that dredging operations, particularly at seaports, frequently extend over a long period of time. Sometimes dredges and the tug boats and scows operated in connection with them are engaged for several years on one operation. Therefore, it would seem that the case last cited is direct authority to substantiate the contention made by appellant.

In *Delaware, L. & W. R. R. Co. v. Pa.*, 198 U. S. 341, a case which denied the right of Pennsylvania to tax a corporation on coal mined in that state but which had been taken out of the state never to be returned, the *American Dredging Co.* decision was discussed and distinguished by this Court at page 356, as follows:

> "The asserted transitory nature of this property" [the coal] "does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, never to return in kind, but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386. That property consisted of vessels, or scows, or tugs, only temporarily out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any actual situs beyond the jurisdiction of the State itself."

It may be remarked that although it appeared in the *American Dredging Co.* case that the vessels were outside the State of Pennsylvania for at least the period of the taxable year, it did not appear for how long a

period in addition to that year that had been outside the jurisdiction. The Court apparently did not deem the length of time during which the property had been and would be out of the State important, but merely considered the temporary character of its absence from Pennsylvania. It is respectfully submitted that this is the correct rule, and that property may be temporarily without the borders of a state for an extended period of time without that state losing jurisdiction over it. The character of the property is an important evidentiary fact to be considered in determining whether the location without the state is permanent or temporary. Dredges, barges, etc., owned by a dredging company would have but a temporary location at the place of their employment in the business of the company, no matter how long they might be engaged there. So, too, paintings loaned by an art collector to a museum for exhibition with the understanding that they should be returned to him when the exhibition had been accomplished, would have only a temporary situs at the place where the exhibition was held, especially if the collector loaned them in the course of a custom which he had pursued for many years of exhibiting them at different places.

In considering this case, the works of art owned by Mr. Clarke are not to be regarded merely as paintings but as a collection of paintings, the only appropriate use of which is for exhibition to the public. They could only have value to him by reason of their use in such manner, just as the vessels of the dredging company could only be of use to it in transitory operations. To illustrate, Mr. Clarke might have stored his paintings in Pennsylvania, and, if so, they might have

acquired a permanent situs there because their use as exhibition pieces would have terminated. They could not, however, acquire a permanent situs in that state by reason of a temporary loan to the museum there, as their original situs was in New York, to which state they were to be returned in accordance with their owner's wishes and pursuant to his course of dealing with them.

In *Gromer v. Standard Dredging Co.*, 224 U. S. 362, Porto Rico attempted to tax certain machinery and boats which at the time the taxes were levied were in the harbor at San Juan engaged in dredging work in pursuance of a contract of the defendant with the United States Government. The defendant was a Delaware corporation. It did not appear how long the dredging machinery had been located in the harbor. The property was held to be taxable, but the prevailing opinion commented upon the fact that the question of temporary situs in the waters of Porto Rico had not been raised and was not in the case. Mr. Justice Day wrote a dissenting opinion, which was concurred in by Justices Hughes and Lamar. These Justices thought that the question of jurisdiction was important, and said (pp. 376-7):

> "It requires a showing that the property sought to be taxed is incorporated in or commingled with the property of the taxing authority, before it can become liable to taxation in any other jurisdiction than that of the domicile of the owner. *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386 (see *infra*).
>
> "The decisions in this court indicate that personal property of a tangible character, to become taxable, must have acquired a *situs* of a permanent nature within the jurisdiction of the author-

> ity seeking to levy the tax. The use of the term 'permanent' in this connection may not mean the continued and unchangeable location of the property at a given place, but certainly does intend to include the idea of location which is not of a temporary or fleeting character."

The opinion continues (p. 379):

> "Tangible personal property is taxable at the owner's domicile, except where it is shown to have an actual *situs* elsewhere, and, as we have seen, actual *situs* is not gained when the property comes only temporarily within the taxing jurisdiction. Applying this test, we are of the opinion that this dredging outfit had not become incorporated into the personal property of the Territory of Porto Rico, as manifestly it was there temporarily only. In our judgment this situation falls far short of a location in Porto Rico sufficient to subject it to the taxing power of that Territory."

The fact that the language above quoted is contained in a dissenting opinion is not an indication that the views expressed were contrary to those of the majority of this Court, for the question of temporary situs was not in the case, and therefore the majority refrained from reference to it.

The views of Justices Day, Hughes and Lamar were in accord with the decision of this Court in *Morgan v. Parham*, 16 Wall. 471, which involved an attempt by the State of Alabama to impose a tax upon a coasting vessel plying between Mobile and New Orleans. This Court said (p. 476):

> "It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal prop-

> erty of that State, but was there temporarily only."

The vessel in the *Morgan* case was in regular trade between Mobile and New Orleans, and undoubtedly was in Mobile for a substantial portion of the year. It is entirely possible that the aggregate period during which it was in Alabama was far in excess of the period during which the Clarke paintings were in Pennsylvania. The case turned upon the point that the vessel had not become incorporated into the personal property of Alabama. Likewise, it cannot be said that the paintings of Mr. Clarke had become incorporated into the personal property of Pennsylvania.

The majority opinion in the Court below finds support for its conclusions in *Blodgett v. Silberman*, 277 U. S. 1, where certain bank notes and coin in a safe deposit box in New York, belonging to a decedent who was domiciled in Connecticut, were held to have an actual situs in New York so as not to be subject to death taxation in Connecticut. This decision was in accord with the decision in *Gromer v. Standard Dredging Co., supra,* and is distinguishable on the same grounds that the latter case has been distinguished in the foregoing argument, viz., that there was no evidence to show that the bank notes and coin were not in New York permanently, whereas here there is ample evidence to establish that the portraits were only temporarily in Pennsylvania.

Another decision closely in point is that in *Joiner v. Pennington*, 143 Ga. 438. There the facts indicate that a portable saw mill had been taxed in a county

other than that in which the owner had his domicile. It was alleged that the mill had been for a year in the county in which it was taxed. The Court said that even so its location in the taxing county might have been only temporary. It further said (p. 440):

> "If the mill is actually a portable saw mill, remaining only temporarily in the place to which it may be carried for operation, and if as a matter of fact it is carried from county to county, then it is clearly taxable as personal property, belonging to the owner in the county of Jefferson, that is, the county of petitioner's" [the owner's] "residence * * *."

It is obvious that it was the character of the saw mill and the nature of its use which governed the Court in its decision and not the element of time. If the location away from the domicile of the owner was temporary, even though it had existed for a year, it could have been temporary had it lasted for three years, if other conditions remained the same.

In *Capital Const. Co. v. City of Des Moines,* 211 Iowa, 1228, it appeared that the plaintiff, a contracting firm, had machinery in Illinois, where it was used on a construction project for a whole year, after which it was returned to Iowa. The plaintiff objected to a tax upon the value of the machinery in the State of Iowa. The Court in its opinion said (p. 1230):

> "The absence of the machinery from the state of Iowa, therefore, was only temporary, and not of a permanent nature."

For this reason the machinery was held to be taxable in Iowa.

In *Semple v. Commonwealth,* 181 Ky. 675, a resident of Texas complained of a tax in the State of Kentucky upon his furniture, automobile and bank account, which apparently had been in Kentucky for a considerable period of time and probably for at least a year. He frequently visited in Kentucky where he maintained an apartment under a yearly lease. At page 682 of the Court's opinion it was said:

> "In order that personal property may have a situs for taxation in a locality different from the domicile of its owner, such personal property must be permanently located at the place where it is sought to be taxed. No temporary location will alter its situs for taxation at a place other than the residence of its owner."

The furniture and automobile were held nontaxable.

The facts in the case at bar make it apparent that the portraits owned by Mr. Clarke were loaned by him to the City of Philadelphia for a purpose which wholly excluded the idea of the acquisition by them of a permanent situs in Pennsylvania.

It is true that the maxim *mobilia sequuntur personam* has not at all times been applied in the same way. It had its birth at a time when the great mass of personal property was tangible, but its application to that class of property has been modified to the extent that it is held not to apply where tangible personal property has acquired an actual and permanent situs away from the domicile of the owner (see *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194). The maxim still applies with respect to tangible personal property which has not acquired a permanent situs away from the domicile of the owner, even though

it may never actually be found at the domicile of the owner (see *Southern Pacific Company v. Kentucky,* 222 U. S. 63). With respect to intangible personal property, which was almost unknown when the maxim originated, it applies with full force and vigor, at least so far as death taxation is concerned (see *First National Bank of Boston, Executor of Haskell, v. State of Maine,* 284 U. S. 312, *supra).* The point is that the maxim is applied by the courts when it is necessary to apply it in order to prevent injustice. The instant case would seem to be one in which it is necessary to apply it in order to prevent a gross injustice.

To illustrate how great an injustice might result if appellant is denied the relief it seeks, suppose that under the law of Pennsylvania bequests of personal property could be made only to direct heirs and that bequests to collaterals were invalid. Assume further that the testator, a resident of New York, bequeathed the paintings to collateral relatives. Would this Court say that the will was invalid and that the wishes of the testator must be frustrated merely because of the fact that during his lifetime, moved by a spirit of philanthropy, he had seen fit to loan the paintings for exhibition in Pennsylvania? Or would it decide that such was a case where in order to prevent injustice the *mobilia sequuntur personam* maxim should be applied so as to permit the wishes of the testator to be carried into effect? If the bequest under such circumstances would be held valid, the same considerations dictate that Pennsylvania be denied the right to tax the paintings, because the basis of death taxation is the granting by a state of the right of succession.

This Court has never held that tangible personal property which is only temporarily away from the owner's domicile may not be taxed by application of the *mobilia sequuntur personam* rule, and it is respectfully urged that no such doctrine should be enunciated in this case.

The decision of this Court in *Frick v. Pennsylvania*, 268 U. S. 473, *supra*, upon which considerable stress is laid by appellees, may be distinguished in very few words. In that case, there was no question of the permanency of the location of the tangibles involved, for they were situated in part in an art gallery built for their reception in the City of New York and in part at the summer home of the decedent. Of course, tangible personal property so situated, with no intention of moving it to the domicile of the owner, is taxable where located. The case is entirely different from the one at bar.

The position of the Tax Commission of the State of New York in this brief is in accord with the law as it has been interpreted in the State of New York and does not represent a mere desire to obtain for New York the tax on the property here involved. In the *Estate of Charles W. Hawthorne*, Surrogate Foley of New York County, on June 9, 1931, made an order exempting from taxation the transfer in the estate of a non-resident of New York of paintings loaned by him for exhibition to an art gallery in the City of New York. Mr. Hawthorne's domicile was in the State of Massachusetts. He was the owner of a collection of paintings which he was accustomed to send to differ-

ent art gallaries throughout the country for exhibition purposes. His death occurred on November 29, 1930. At that time, and for several years prior thereto certain of his paintings had been on exhibition at the Grand Central Art Galleries in New York City. This institution sometimes exhibited the paintings in their own galleries in New York and sometimes sent them to be exhibited in other art galleries. Mr. Hawthorne, himself, from time to time withdrew some of his paintings from the custody of the Galleries and exhibited them elsewhere. At the time of his death, forty-eight of his paintings were on exhibition in New York. Under the regulations of the Galleries, Mr. Hawthorne was privileged to exhibit there such pictures as he chose and could withdraw any or all of them at any time.

The Grand Central Art Galleries is a New York membership corporation, not conducted for profit, and its purpose is to promote interest in art and encourage and assist living American artists. Its galleries are open to the public. Pictures loaned to it are displayed therein, and frequently special exhibitions are held of the works of different individual American artists.

The Surrogate of New York County made the order of exemption above referred to, although the facts did not present as strong a case for exemption from the New York tax as is presented by the facts before this Court for exemption from the Pennsylvania tax, inasmuch as it did not appear that the Hawthorne paintings had ever had a situs in Massachusetts before they were sent to New York.

Although the New York Tax Commission had the right of appeal from this order of the Surrogate, they acquiesced in the decision, believing that it was correct not only from the standpoint of law but also from that of public policy. Their action in filing this brief is consonant with and for the purpose of upholding the position so taken by them.

It is respectfully submitted that the decision below should be reversed and the prayer of the bill of complaint granted.

SETH T. COLE,
Counsel for
Tax Commission of the
State of New York.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1934.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, Deceased, Appellant,
vs.
William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

[November 5, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

The Pennsylvania inheritance tax law imposes a tax upon the transfer by will or intestate laws of personal property within the Commonwealth when the decedent is a nonresident at the time of his death.* Thomas B. Clarke, a resident of New York, loaned paintings to a museum in Pennsylvania and died testate while they were on exhibition there. His will was admitted to probate in New York, and letters testamentary issued to appellant to which, as trustee, the residuary clause transferred the pictures. The appellees, acting respectively as attorney general and secretary of revenue of Pennsylvania, proceeded to appraise and assess the pictures for the purpose of collecting the inheritance tax.

*Section 1 of the Act of June 20, 1919, P. L. 521, 72 P. S. § 2301, as last amended by the Act of June 22, 1931, P. L. 690, provides in part as follows:

"Section 1. Be it enacted, etc., That a tax shall be, and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:

. . . . . .

"(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, or of shares of stock of corporations of this Commonwealth or of national banking associations located in this Commonwealth, and the decedent was a nonresident of the Commonwealth at the time of his death."

Appellant, maintaining that when the owner died the paintings had no actual situs within Pennsylvania because only temporarily there, brought this suit to enjoin enforcement on the ground that, if the statute be construed to tax the transfer by the death of the nonresident owner, it is repugnant to the due process clause of the Fourteenth Amendment. As the transfer cannot be subjected to taxes imposed by more than one state (*Frick* v. *Pennsylvania*, 268 U. S. 473, 488-492. *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 93. *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204, 210. *First National Bank* v. *Maine*, 284 U. S. 312, 326-327.) appellant framed its complaint to call for a decision whether Pennsylvania or New York is entitled to the tax. The New York tax commission as *amicus curiae* filed briefs below and also in this court supporting the claim that the transfer is subject to the New York tax.

The district court, consisting of three judges, § 266, J. C., dismissed the suit on the ground that appellant had an adequate remedy at law. This court reversed and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits. *City Bank Co.* v. *Schnader*, 291 U. S. 24. Then the case was submitted and tried on the facts alleged in the bill and answer and additional ones that were stipulated by the parties. Upon the circumstances detailed in its findings the court concluded that 79 portraits belonging to Clarke that were included in the collection on exhibition in the Pennsylvania museum at the time of his death then had an actual situs in that State, and held the transfer subject to the Pennsylvania inheritance tax.

The material substance of the findings follows:

In March, 1928, Clarke at the request of the director of the Pennsylvania museum, loaned to it the 79 pictures, together with 85 others owned by a corporation of which he was sole stockholder. At the time of the loan, they were, and long had been kept, in New York City. Five were at his residence, ten were on exhibition, and the remaining 64 were in storage. When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space and thereafter did nothing to secure another place in which to put them. But suitable space was always readily available in New York.

The arrangement with the museum was oral; no consideration was to be paid, and it was understood that at any time on Clarke's request the pictures would be returned to him. In the spring of

1929, Clarke wrote the director, at the latter's solicitation, that he would sell the entire collection at a stated price to anyone who would present it to the museum, it being understood that he would allow the pictures to remain at the museum for a reasonable time for the director to find such a donor. In May, 1930, he stated that this arrangement would terminate June 17, 1930. But at the director's request he permitted the pictures to remain, upon the understanding that, whenever he so requested, they would be returned to him in New York. Thereafter, he was willing to sell the collection as a whole for presentation to the Pennsylvania museum or to a substantially similar institution.

Clarke made no definite plans or request for the return to New York of the paintings. None was ever removed from the museum except four which, at his request, were sent to Virginia in April, 1929, for exhibition and were returned in May. When he died, January 18, 1931, all the paintings were at the museum.

The museum was not conducted for profit. It secured through voluntary loans from nonresidents a substantial portion of the works of art which it displayed. None of these was regarded or intended as a permanent loan. It is customary for public museums to secure pictures for exhibition in this manner. The period elapsing until Clarke's death was shorter than the usual period of such loans.

The power to regulate the transmission, administration and distribution of tangible personal property rests exclusively in the State in which the property has an actual situs, regardless of the domicile of the owner. If at the time of his death the actual situs of Clarke's pictures was in Pennsylvania, they were wholly under the jurisdiction of that State. The fact that being a resident of New York he, by will probated in that State, disposed of the pictures detracted nothing from the exclusive jurisdiction of Pennsylvania to tax the transfer effected by his death. New York laws had no bearing other than that attributable to their implied adoption by Pennsylvania. Assuming actual situs in Pennsylvania, the paintings there on exhibition when the owner died are not to be distinguished, so far as concerns the imposition of the inheritance tax, from land located within that State. *Frick* v. *Pennsylvania, supra,* 489-493.

We regard as unimportant and negligible Clarke's suggestions that the pictures be returned because on each occasion he acceded

to opposing suggestions of the director and continued his consent that they remain temporarily at the museum subject to his orders. Mere floating intention that sometime in the future the pictures would be returned to New York was not sufficient to retain them within the jurisdiction of that State and to keep them without the jurisdiction of Pennsylvania. Cf. Story, Conflict of Laws, 8th ed., § 46. And obviously without weight are the facts that Clarke made the loan without pay, gave up the warehouse in which he had kept some of the pictures and died without providing a place for them in New York.

The significant features of the transaction are these: Prior to the loan the pictures that went to make up the collection had an actual situs in New York. The loan was not made for a short and definite period and it was subject to the right of the owner to have the pictures returned to New York at any time. He did not call for their return but with his consent they were kept in Pennsylvania and there exhibited until he died two years and ten months after the loan. With the exception of the four pictures temporarily sent to Viriginia, none was taken from Pennsylvania. For nearly two years next preceding his death Clarke was willing—indeed, he authorized the director—to sell the collection to anyone who would buy at the specified price and donate them to the Pennsylvania museum. And during the last six months of his life he was willing to sell to any purchaser that would give them to any institution similar to the Pennsylvania museum. It does not appear that Clarke ever intended to have the pictures returned to New York at any definite date or upon the happening of any event or at all. Until his death he permitted the pictures to be kept and used in the Pennsylvania museum merely subject to his right at any time to order them taken to New York or elsewhere.

In respect of situs for taxation, the collection of portraits is quite unlike vessels and railway rolling stock that in fulfilling the purpose of which they are created move from place to place and into different States. Cf. *Hays* v. *The Pacific Mail Steam-ship Company*, 17 How. 596, 599. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 23. *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, 161. Before the loan was made the pictures had an actual situs in New York, so as to be within the taxing power of that State, though it cannot be said that they were there permanently located in the

sense of that phrase when used in respect of land, buildings or other items of fixed real property. The location of the portraits in Pennsylvania was not merely transient, transitory or temporary but it was fixed in an established abiding place in which they remained for a long time. Undoubtedly, they became subject to the taxing power of the State. Cf. *Brown* v. *Houston*, 114 U. S. 622, 632-633. *Pittsburg &c. Coal Co.* v. *Bates*, 156 U. S. 577, 589. *Kelley* v. *Rhoads*, 188 U. S. 1, 7. *General Oil Co.* v. *Crain*, 209 U. S. 211, 230. By sending them into Pennsylvania and by his omission to have them returned to New York and his lack of definite intention ever so to do Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania. The principle applied in *Frick* v. *Pennsylvania, supra*, 490-494, and in *Blodgett* v. *Silberman*, 277 U. S. 1, 18, governs this case.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.